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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF COMMISSIONERS OF
DICKINSON COUNTY, KANSAS, and
KEITH HOFFMAN,

Petitioners,

v.

ABILENE RETAIL #30, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court should preserve the deference afforded legislative judgment in local regulation of sexually oriented businesses. The Tenth Circuit would impose greater burdens upon the government than those outlined in *Renton* and *Alameda Books*, creating two Circuit splits and subjecting legislative judgment to impossible levels of proof and the veto power of a jury.

A. There is not a separate and more stringent burden of proof imposed upon rural governments to justify regulation of sexually oriented businesses.

B. Those seeking to cast direct doubt on legislative judgment must do something more than simply produce an "expert" to second guess the government's rationale and criticize the information upon which it relied in making its judgment.

C. When the government supplies supplemental evidence to rebut doubts about its legislative judgment, the legislation is valid. Meeting the requirements of *Alameda Books* results in judgment for the government, not a jury trial to weigh competing rationales.

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PETITION FOR WRIT OF CERTIORARI

The Board of Commissioners of Dickinson County, Kansas, and Keith D. Hoffman (hereinafter, "the County") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, dated July 10, 2007, is officially reported at 492 F.3d 1164 (10th Cir. 2007), and is reproduced at Appendix 1a-48a.

The order of the United States Court of Appeals for the Tenth Circuit, dated October 25, 2007, denying the County's motion for rehearing *en banc*, with accompanying dissent, is reported at 508 F.3d 958 (10th Cir. 2007), and is reproduced at Appendix 49a-56a.

The order of the United States District Court for the District of Kansas, dated December 1, 2005, is officially reported at 402 F.Supp.2d 1285 (D.Kan. 2005), and is reproduced at Appendix 57a-77a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on July 10, 2007. A timely petition for rehearing *en banc* was filed by the County on July 25,

2007. The petition for rehearing *en banc* was denied in an order filed October 25, 2007.

This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and 13.3 because it is filed within 90 days of the denial of the County's timely petition for rehearing *en banc*. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The relevant constitutional provision involved is Constitution of the United States, Amendment 1:

"*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added.)

The relevant local ordinance involved is Dickinson County, Kansas, Ordinance 121304A. It is reproduced in full at Appendix 78a-114a.

STATEMENT OF THE CASE

Abilene Retail owns and operates an adult bookstore in rural Dickinson County, Kansas, known as "The Lion's Den." Abilene Retail challenged a zoning ordinance which restricted the location and mode of operation of sexually oriented businesses within the County, asserting that the ordinance violated the First Amendment.

Abilene Retail sought declaratory and injunctive relief in the United States District Court for the District of Kansas. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because the matter was a civil action arising under the Constitution of the United States. Further, the district court had jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and (4), 28 U.S.C. § 2201 and 2202, and 42 U.S.C. § 1983 and 1988 on the basis that the petition sought declaratory relief to redress alleged deprivation of rights, privileges and immunities secured by the Constitution of the United States committed under color of state law.

The County repealed the ordinance and adopted a second zoning ordinance addressing sexually oriented businesses.[1] Abilene Retail amended its complaint to challenge the second ordinance only. The parties agreed to a preliminary injunction staying enforcement of the ordinance pending a decision on the merits from the district court.

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[1]The second ordinance, and the only one at issue in this case, is 121304A. It is reproduced in its entirety at App.78-114a.

The district court granted the County's motion for summary judgment on all claims of Abilene Retail. Pertinent to this petition is the district court's conclusion that the ordinance was content neutral and designed to address the negative secondary effects of sexually oriented businesses in Dickinson County. The district court held that the ordinance survived intermediate scrutiny and did not violate the First Amendment.

Abilene Retail appealed the decision to the United States Court of Appeals for the Tenth Circuit. Pertinent to this petition, a majority of the Tenth Circuit panel concluded that while the ordinance was content neutral, there remained a disputed question of material fact regarding whether the ordinance was designed to serve an admittedly substantial government interest.

Two members of the Tenth Circuit panel believed that there remained a dispute about whether the County reasonably relied on case law and secondary effects studies from other jurisdictions in passing the second ordinance. A concurring member of the panel disagreed, concluding that the County reasonably relied on the materials at issue, but that Abilene Retail cast direct doubt on the validity of the underlying fact findings made by the County and the studies it relied upon in support of the second ordinance. Further, the concurrence concluded that the County in its supplemental submissions failed to provide evidence sufficient to support the ordinance, creating a triable fact issue. The majority adopted the

reasoning of the concurrence on the latter two issues as an alternative ground for its holding.

The County filed a petition for rehearing *en banc*, arguing that the majority and concurring analyses directly contradict seminal United States Supreme Court decisions, including *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); as well as the precedent of the Tenth Circuit, namely *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998). Further, the County asserted that the majority and the concurring opinions created a split among the circuits by diverging from decisions such as *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); and *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007).

The Tenth Circuit ordered Abilene Retail to file a response to the petition for rehearing *en banc*. The petition was denied by a 7-5 vote of the court. Judge Gorsuch filed a dissent from the denial of rehearing, joined by Judge Kelly. Judge Gorsuch observed that the case was one of great legal significance because it "opens not one, but two, splits with our sister circuits on important questions of law concerning the amount of judicial deference due legislative judgments." (App. 52a)

The County petitions this Court for review of the Tenth Circuit's decision holding that there is a dispute of material fact regarding whether the County reasonably relied on certain case law and secondary effects studies in passing the second ordinance, that Abilene Retail cast direct doubt on the validity of the underlying fact findings made by the County and the studies it relied upon, and that the County in its supplemental submissions failed to produce evidence entitling it to judgment as a matter of law.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD PRESERVE THE DEFERENCE AFFORDED LEGISLATIVE JUDGMENT IN LOCAL REGULATION OF SEXUALLY ORIENTED BUSINESSES. THE TENTH CIRCUIT WOULD IMPOSE GREATER BURDENS UPON THE GOVERNMENT THAN THOSE OUTLINED IN *RENTON* AND *ALAMEDA BOOKS*, CREATING TWO CIRCUIT SPLITS AND SUBJECTING LEGISLATIVE JUDGMENT TO IMPOSSIBLE LEVELS OF PROOF AND THE VETO POWER OF A JURY.

The Tenth Circuit held that the County's ordinance was content neutral legislation designed to regulate the secondary effects of sexually oriented businesses. Thus, the ordinance is subject to intermediate scrutiny under the First Amendment. The ordinance must be upheld as long as it is "designed to serve a substantial government interest" and reasonable alternative avenues of communication remain available. *Alameda Books*, 535 U.S. at 434.

The Tenth Circuit did not reach the issue of alternative avenues. Instead, it concluded that there is a disputed question of fact about whether the ordinance is "designed to serve" an admittedly substantial government interest.

The Tenth Circuit applied the three-step burden shifting approach set forth in *Alameda Books*. This test requires the County to show that in passing the ordinance it relied upon "evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest." 535 U.S. at 438-39. If the County succeeds, the burden shifts to Abilene Retail to "cast direct doubt" upon the County's evidence either by proving that the County's evidence does not support its rationale for the ordinance or by disproving the County's factual findings. *Id.* If Abilene Retail casts direct doubt, the burden shifts back to the County to "supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.*

The Tenth Circuit claimed to be "mindful" that it had no right to reweigh the evidence *de novo* or substitute its judgment for that of the legislative body. Unfortunately, this is exactly what occurred.[2] The

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[2]App. 16a. The Tenth Circuit reviewed the legislative record and decided that a rural interstate was a logical – even desirable – place for an adult superstore. "To hold that legislators may reasonably rely on those studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County, would be to abdicate our

(continued...)

Tenth Circuit disregarded the deference owed Dickinson County in regulating businesses within its own borders, creating dangerous precedent which will subject legislative judgment to impossible levels of proof and the veto power of a jury.

A. THERE IS NOT A SEPARATE AND MORE STRINGENT BURDEN OF PROOF IMPOSED UPON RURAL GOVERNMENTS TO JUSTIFY REGULATION OF SEXUALLY ORIENTED BUSINESSES.

Never before has this Court or any other required a rural government to meet a burden beyond that imposed on urban governments in order to justify a local zoning ordinance under *Renton* and *Alameda Books*. The Tenth Circuit created from whole cloth an additional burden and arbitrarily imposed it upon this rural County. In doing so, the Tenth Circuit departed from Supreme Court precedent and created a split among the Circuits.

The County enacted an ordinance regulating the location and operation of sexually oriented businesses to prevent the negative secondary effects associated with these businesses. *Alameda Books* requires that the County provide evidence it "reasonably believed to be relevant" to demonstrate a connection between this admittedly substantial government interest and the

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[2](...continued)
'independent judgment' entirely." (App. 20a) The opinion later states that Abilene Retail's existing location along the highway, according to a "common sense" reading of the studies, "would best limit any secondary effects. (App. 20a)

ordinance. The County's burden at this point in the analysis is very light. 535 U.S. at 451. *See also Doctor John's, Inc. v. City of Roy,* 465 F.3d 1150, 1166 (10th Cir. 2006) (initial burden is "slight"); *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1198 (10th Cir. 2003) (initial burden is "minimal"). Only those who fail to offer any evidence justifying an ordinance fall short of this deferential standard. See *Illusions-Dallas Private Club, Inc. v. Steen,* 482 F.3d 299, 312-15 (5th Cir. 2007); *White River Amusement Pub, Inc. v. Town of Hartford,* 481 F.3d 163, 171-73 (2nd Cir. 2007); *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402, 411-13 (7th Cir. 2004); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251, 1266-69 (11th Cir. 2003).

This Court has confirmed that a local government may rely upon studies from other cities and judicial opinions from other jurisdictions in regulating sexually oriented businesses. *Renton,* 475 U.S. at 50-52 (First Amendment does not require government to produce new studies or rely on materials independent of those used in other locales).

Here, the County relied upon 20 secondary effects studies of various types of sexually oriented businesses in other cities and counties across the country. The County also relied upon 27 judicial opinions from a number of federal courts including this Court, the Tenth Circuit, and courts in other Circuits. See App. 81a-82a.

Other local governments have relied on a nearly identical body of information in regulating sexually

oriented businesses, and that information was deemed sufficient by the Tenth Circuit and others. *Doctor John's,* 465 F.3d at 1165-66; *Heideman,* 348 F.3d at 1186-87, 1199-1200; *Andy's Restaurant & Lounge, Inc. v. City of Gary,* 466 F.3d 550, 554-55 (7th Cir. 2006); *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees,* 411 F.3d 777, 791 (6th Cir. 2005); *Zibtluda, L.L.C. v. Gwinnett County,* 411 F.3d 1278, 1286-87 (11th Cir. 2005); *Gammoh,* 395 F.3d at 1126; *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 725-26 (7th Cir. 2003).

The majority in the instant case criticized the County's failure to rely upon a secondary effects study from an entirely rural area such as Dickinson County. The Tenth Circuit also found fault with the County's failure to "analogize" how the studies it relied upon might apply to its more isolated rural setting.[3]

The County need not rely upon secondary effects evidence from an entirely rural area to justify its ordinance.[4] In *Renton,* the Ninth Circuit struck down

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[3]The County did make such an analogy, and it appears in the preamble and findings within the ordinance. See App. 79a-83a (citing urban studies and anticipating similar negative secondary effects within the County).

[4]Even though it is not required to do so, the County supplied evidence in the district court of negative secondary effects associated with another rural adult superstore in the Lion's Den chain. The store in question was situated on the same interstate (I-70) as Abilene Retail in a rural county in Illinois. *Deters v. The Lion's Den, Inc.*, case no. 04-CH-26, order filed July 13, 2005, Fourth Judicial Circuit, Effingham County, Illinois.

(continued...)

the local ordinance on the basis that Renton failed to prove that its legislative evidence – from Seattle, a city 20 times the size of Renton – was relevant "to the particular problems or needs of Renton." *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 537 (9th Cir. 1984). This Court reversed, rejecting the more "rigid burden of proof' imposed by the Ninth Circuit, and concluding that local governments need not produce evidence of negative secondary effects independent of that generated by other, not necessarily similar, jurisdictions. *Renton*, 475 U.S. at 51-52.

The majority decision here is a clear departure from *Renton*. It also creates a split of authority with the Fifth Circuit, the only other Circuit to directly address the rural versus urban distinction. See *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002).[5]

In *LLEH*, the Fifth Circuit held that the district court erred in considering the rural setting of Wichita County versus the urban setting of the studies it relied upon in passing its ordinance. "The secondary effects that urban areas have experienced (well documented in the relied-upon studies) are precisely what the County is attempting to *avoid*." *Id.* at 367. The Fifth Circuit reasoned:

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[4](...continued)

[5]The County in this case specifically stated that it relied on *LLEH* when adopting its ordinance. See App. 82a.

> "Accordingly, it is logical that the County would: (1) review the experiences of urban areas, as discussed in the studies; (2) consider what measures those areas have employed to combat secondary effects; and (3) tailor those corrective measures to the County's needs. By so doing, the County may, in its continued growth and development, successfully sidestep many of the problems encountered by urban areas. In this respect, the relied-upon studies are 'reasonably believed to be relevant' to the problems the County seeks to address. *See Renton,* 475 U.S. at 51, 106 S.Ct. 925." *Id.*

The majority in this case criticized the Fifth Circuit for allowing a rural county to use urban studies to justify its ordinance, ostensibly in light of a rural county's ability to revisit its zoning laws "in the event that it sees an uptick in the number of sexually oriented businesses locating in its jurisdiction."[6] This reasoning is flawed in at least two respects.

First, the Tenth Circuit ignores the fact that urban counties, too, have the ability to "revisit" zoning laws as the number of sexually oriented businesses (and arguably, negative secondary effects) increase. The law imposes no "wait and see" burden on local

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[6]App. 20a.

government, yet the Tenth Circuit here would create such a burden and impose it only upon rural America.

Second, the majority ignores the bedrock concept that local governments are not required to suffer the negative secondary effects of adult businesses before being allowed to regulate them. *Renton*, 475 U.S. at 51-52. Indeed, the whole point of regulation is to avoid such secondary effects. The majority would carve out an exception for rural jurisdictions, requiring them to wait until sexually oriented businesses proliferate and cause harm before being allowed to rely on urban studies to support regulation. The majority fails to explain its rationale and there is certainly no case law to support it.

The majority has created and applied a more stringent burden of proof to rural governments than is required by the first step of the *Alameda Books* analysis. This Court must grant certiorari to consider whether this separate and more strict burden of proof is warranted and resolve a split in the Circuits created by this case and *LLEH*.

B. THOSE SEEKING TO CAST DIRECT DOUBT ON LEGISLATIVE JUDGMENT MUST DO SOMETHING MORE THAN SIMPLY PRODUCE AN "EXPERT" TO SECOND GUESS THE GOVERNMENT'S RATIONALE AND CRITICIZE THE INFORMATION UPON WHICH IT RELIED IN MAKING ITS JUDGMENT.

The concurring opinion by Judge Ebel recognizes that the County has cleared the low hurdle of the first step of *Alameda Books*, but proceeds to raise the bar on

the second and third steps so high that they cannot be cleared as a matter of law by any local government. The majority adopted the reasoning of Judge Ebel on the second and third steps of *Alameda Books* as an alternative ground supporting its decision.

Because the County met the initial test in *Alameda Books,* the burden shifts to Abilene Retail to "cast direct doubt" on the City's rationale for adopting the ordinance. 535 U.S. at 438. This can be done in one of two ways: 1) prove that the County's evidence does not support the rationale that restricting the location and operation of adult businesses will reduce the adverse secondary effects; or 2) disprove the County's factual findings justifying the ordinance. *Id.* at 438-39.

The Tenth Circuit concluded that the opinions of industry "expert" Dr. Daniel Linz were sufficient to cast direct doubt upon the County's rationale in both ways because: 1) Dr. Linz attacked the studies and reports upon which the County relied as invalid or unreliable; 2) Dr. Linz conducted his own studies which indicated that sexually oriented businesses do not produce the negative secondary effects the County seeks to avoid; and 3) Abilene Retail supplied evidence that its store in Dickinson County had not yet produced these negative secondary effects.

The opinions of Dr. Linz demonstrate nothing more than an academic disagreement about whether sexually oriented businesses give rise to negative secondary effects. The existence of a disagreement does not cast direct doubt on reasoned legislative judgment that the potential for negative secondary effects is real and the studies suggesting the same are reliable.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the record before this Court included an article by Dr. Linz in essentially the same form as the Linz article cited by Judge Ebel in the instant case.[7] The premise asserted by Dr. Linz was and is that none of the studies linking sexually oriented businesses and negative secondary effects have been conducted with methodology sound enough to satisfy the standard for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[8]

This Court in *Erie* took a dim view of Dr. Linz' opinions, observing that the Linz report "does not cast any legitimate doubt" on the findings of the Erie city council. 529 U.S. at 298. Further, the plurality opinion in *Erie* criticized Justice Souter's dissenting citation to the Linz report, emphasizing that this Court has "flatly rejected" academic studies disclaiming secondary effects as wholly insufficient to cast direct

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[7]Amicus brief filed in *Erie*, Brief and Appendix of First Amendment Lawyers Association, 1999 WL 805047, *20, Linz article attached.

[8]No court before or since has superimposed the *Daubert* standard upon the *Renton* analysis. See *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 640 (7th Cir. 2003) ("[Daubert]-quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would – undeniably – reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.")

doubt on the judgment of local governments. 529 U.S. at 300.[9]

The persuasive value of Dr. Linz' opinions and reports has been consistently rejected by other Circuits. Dr. Linz is the expert of choice of the adult business industry. He has offered his testimony, opinions and reports in many other cases. Other Circuits which have addressed the issue have held that the information offered by Dr. Linz is insufficient as a matter of law to cast direct doubt on a local government's secondary effects rationale. See *G.M. Enterprises*, 350 F.3d at 638-39; *SOB*, 317 F.3d at 863; *Gammoh*, 395 F.3d at 1126-27; *Daytona Grand*, 490 F.3d at 882-885, specifically 883 fn. 33 (11th Cir. 2007). See also *84 Video/Newsstand, Inc. v. Sartini*, 2007 WL 3047207 (N.D. Ohio 2007).

The Tenth Circuit's decision to the contrary not only creates a split in the Circuits, but marks the Tenth Circuit as the only one to afford more deference to the opinions of one adult business "expert" than the considered judgment of a local governing body. Compare also *5634 East Hillsborough Ave. v. Hillsborough County*, 2007 WL 2936211 (M.D. Fla. 2007) (court granted summary judgment to county despite criticism of four industry experts).

The opinions of Dr. Linz, even if credited, prove nothing except that the studies relied upon by the

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[9]In *Alameda Books*, the plurality – again over Justice Souter's dissent and a Linz paper submitted attached to an amicus brief – rejected the idea that local governments must support their rationale with empirical evidence. 535 U.S. at 439.

County are open to interpretation and perhaps criticism. In holding that Dr. Linz has "cast direct doubt" upon the County's rationale, the Tenth Circuit would prevent a local government from relying upon the body of cases and studies already approved by this Court and other Circuits. The Tenth Circuit would allow Dr. Linz and his associates to undermine legislative judgment with nothing more than a contrary opinion and a scattering of academic criticisms.

The Tenth Circuit would place upon local governments a burden to not only read and absorb scholarly materials, but to delve into questions about their scientific validity in order to justify an ordinance. This is clearly beyond what is required by the law. The legislative judgment of three part-time Dickinson County commissioners, none of whom are mathematicians or scientists, cannot be called into question based upon their failure to probe the statistical reliability of the studies at hand. *Gammoh,* 395 F.3d at 1126-27 ("While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform.").

Finally, the panel was unduly and improperly influenced by the suggestion that Abilene Retail's adult superstore has not yet produced negative secondary effects in Dickinson County. The panel would translate this suggestion into "corroboration" of Dr. Linz's opinion that sexually oriented businesses do

not produce negative secondary effects.[10] This piece of information, even if assumed to be true, does nothing more than add fuel to the debate over whether and to what extent sexually oriented businesses harm the community. As discussed above, the mere existence of the debate is not enough to cast direct doubt on legislative judgment.

Local government "need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses." *Z.J. Gifts,* 136 F.3d at 688. The validity of an ordinance does not require the presence of a sexually oriented business, let alone proof that it has caused specific and local negative secondary effects. See *Fantasy Ranch Inc. v. City of Arlington,* 459 F.3d 546, 559-61 (5th Cir. 2006) (evidence that plaintiff's sexually oriented business did not spawn secondary effects in the community was "plainly insufficient to preclude summary judgment").

The Tenth Circuit allows an academic dispute to cast direct doubt on the considered legislative judgment of a local governing body. This conflicts with precedent in *Erie* and creates a split between the Tenth Circuit and every other Circuit to consider this issue. This Court should grant certiorari to consider whether the opinions of one "expert" should be credited

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[10]App. 42a-43a. Judge Ebel incorrectly states that Abilene Retail has operated its store in "an unrestricted manner." The County has enforced portions of the ordinance, including the licensing provisions, since the district court's order on summary judgment.

above reasoned legislative judgment, and whether lack of specific evidence of secondary effects at this particular store casts doubt upon the validity of the ordinance.

C. WHEN THE GOVERNMENT SUPPLIES SUPPLEMENTAL EVIDENCE TO REBUT DOUBTS ABOUT ITS LEGISLATIVE JUDGMENT, THE LEGISLATION IS VALID. MEETING THE REQUIREMENTS OF *ALAMEDA BOOKS* RESULTS IN JUDGMENT FOR THE GOVERNMENT, NOT A JURY TRIAL TO WEIGH COMPETING RATIONALES.

In *Alameda Books,* this Court said that if the challenger casts direct doubt upon legislative judgment, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." 535 U.S. at 439.[11]

The Tenth Circuit acknowledged that the County in this case supplemented the record with evidence justifying its rationale for the ordinance. Indeed, the County offered the opinion of its expert, Dr. Richard McCleary, that the studies and opinions of Dr. Linz are invalid and unreliable, and that the studies relied upon by the County are sound. The County also offered a state court's opinion and order which contained anecdotal evidence of negative

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[11]This Court need not reach the third step of the *Alameda Books* analysis if it concludes, as it should, that Abilene Retail failed to cast direct doubt on the County's evidence or rationale supporting the ordinance.

secondary effects caused by a Lion's Den store along Interstate 70 in rural Illinois.[12]

Rather than conclude that this evidence met the County's purported burden to supplement, the Tenth Circuit held that it gave rise to a "battle of the experts" which must be fought at trial. In support of this rather unlikely conclusion, the Tenth Circuit cited a handful of cases involving a "battle of the experts" over issues such as whether certain disorders are predictors of future mental health problems and the effect of weather conditions on the cause of an airplane crash. The Tenth Circuit cited no case where a "battle of the experts" was waged in an effort to evaluate the wisdom of legislative judgment, let alone one where the battle was won or lost in the jury room.[13]

The Tenth Circuit would create a fact question out of every disagreement over the need for government regulation. This reasoning renders

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[12] The opinion and order of the Fourth Judicial Circuit in Effingham County, Illinois, contained a description of sworn testimony about the negative secondary effects of a Lion's Den store in rural Effingham County. These negative secondary effects included suspected sexual activity in the parking lot of the store, pornographic litter, and decreased use of a nearby park. *Deters v. The Lion's Den, Inc.*, case no. 04-CH-26, order filed July 13, 2005, Fourth Judicial Circuit, Effingham County, Illinois. The County attached the opinion to its reply in support of summary judgment and it was part of the record before the district and appellate courts in this case.

[13] In a slightly different First Amendment context, the experts' disagreement over the need for, or nature or quality of regulation did not require a trial. See *Turner Broadcasting System, Inc. v. F.C.C.* 520 U.S. 180, 211 (1997).

meaningless the third step of *Alameda Books*. This Court did not provide local government the opportunity to supplement evidence in support of its legislative judgment only to reward its success with the demands of a trial on that very issue.

This Court has never addressed the quantum of evidence required to meet this burden. This Court should grant certiorari to consider the burden of proof imposed by the third step in *Alameda Books*. Further, this Court should establish that meeting the burden to supplement results in a valid ordinance, not a jury trial to decide the merits of an academic debate between industry experts.

CONCLUSION

The petition for writ of certiorari should be granted.

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
July 10, 2007
Elisabeth A. Shumaker
Clerk of the Court

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ABILENE RETAIL #30, INC., Plaintiff - Appellant, v. BOARD OF COMMISSIONERS OF DICKINSON COUNTY KANSAS; KEITH D. HOFFMAN, Defendants-Appellees.	No. 05-3473

Appeal from the United States District Court for the District of Kansas (D.C. No. 04-CV-2330-JWL)

J. Michael Murray, Berkman, Gordon, Murray, & DeVan, Cleveland, Ohio (Raymond V. Vasvari, Jr., Berkman, Gordon, Murray & DeVan, and Richard T. Bryant, Richard T. Bryant & Associates, Kansas City, Missouri, with him on the briefs), for the Plaintiff-Appellant.

Scott D. Bergthold, Chattanooga, Tennessee (J. Steven Pigg and Teresa L. Sittenauer, Fisher, Patterson, Sayler, & Smith, Topeka, Kansas, with him on the briefs), for the Defendants - Appellees.

Before **LUCERO**, Circuit Judge, **McWILLIAMS**, and **EBEL**, Senior Circuit Judges.

LUCERO, Circuit Judge.

Abilene Retail #30, Inc. ("Abilene") appeals from a district court order granting summary judgment in favor of the Board of County Commissioners of Dickinson County, Kansas (the "Board"). Abilene, which owns and operates an adult bookstore in Dickinson County named "The Lion's Den," challenged a zoning ordinance which restricts The Lion's Den's location and mode of operation. Abilene contends the ordinance violates the First Amendment. The district court held the ordinance to be a content-neutral effort to address the secondary effects of adult businesses in Dickinson County. It further concluded that the ordinance survived intermediate scrutiny, which we apply to content-neutral zoning ordinances under City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), and its progeny. We agree the ordinance is facially content neutral, but conclude a genuine dispute of material fact exists as to whether the Board reasonably relied on studies analyzing the secondary effects of adult businesses on surrounding communities in passing the ordinance. If the Board's reasonable reliance were not in dispute, we agree that Abilene has

cast sufficient doubt on the Board's rationale to preclude summary judgment. On that basis, we join in the concurrence of Judge Ebel as an alternative ground for our holding. Exercising jurisdiction pursuant 28 U.S.C. § 1291, we **RESERVE** the district court's grant of summary judgment, and **REMAND** to the district court for further consideration of this claim. We **AFFIRM** the district court's judgment with respect to Abilene's Fourth and Fourteenth Amendment claims.

I

Abilene opened the Lion's Den at a rest stop off of Interstate 70 ("I-70") in Dickinson County, Kansas in September 2003. The Lion's Den appears to be the first sexually oriented business in the County in at least 25 years, and it may be the first such business in County history. It is located just off an exit ramp on I-70, in an unincorporated portion of the County. The total population of the unincorporated portions of Dickinson County is small, numbering just over six thousand people. Adult bookstores located near highway exit ramps rely on business from passing interstate traffic. The store's inventory is almost entirely adult-orientated, and consists of a variety of sexual devices and sexually explicit magazines, videos, and DVDs.

Soon after the Lion's Den opened for business, local residents began protesting outside its doors. As early as September 22, 2003, individual Dickinson County residents appeared before the Board and testified to a variety of possible negative consequences

of the store's continued operation.[1] They requested the Board, composed of one chairman and two commissioners, consider options to limit the proliferation of adult businesses in the County.

In response, the Board passed "Dickinson County Kansas Sexually Oriented Business Ordinance No. 070804" (the "First Ordinance") on July 8, 2004. In the preamble to the First Ordinance the Board noted that the operation of sexually oriented businesses leads to a variety of negative secondary effects, and cited to a number of cases and studies that support such a finding. In an attempt to curb these secondary effects, the First Ordinance: (1) provided that all businesses devoting ten percent or more of their floor space to adult materials must obtain a license from the County; (2) required disclosure of certain corporate documents as part of the application for a license, including ownership documents related to the land on which the store sits; (3) required disclosures of all owners with a ten-percent or greater ownership stake as part of the application for a license, and further requires those owners to provide fingerprint cards and disclose their social security numbers; (4) imposed a $500 licensing fee; (5) limited the business' operating hours from 10 a.m. to 10 p.m.; (6) provided for a variety of limitations on signage; (7) set a one-year amortization period; (8) imposed a distance requirement of 1500 feet between adult

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[1]Dickinson County did not experience any negative secondary effects, such as an increase in crime or neighborhood blight, attributable to The Lion's Den. Undersheriff John Nachtman testified that, with one exception, the only calls for service attributable to The Lion's Den were in connection with demonstrators who gathered to protest the store's opening.

businesses and certain uses, including residences, schools, houses of worship, and any section of interstate highway.

Although the First Ordinance contains a lengthy preamble citing to a variety of secondary-effects studies and case law, the Board did not consider any of the cited materials before passing the First Ordinance. In fact, the evidence shows it is unlikely any of the commissioners had those documents at that time.

On July 16, 2004, Abilene challenged the First Ordinance in federal district court, seeking a retraining order and preliminary injunction. After the parties agreed to a preliminary injunction staying enforcement of the First Ordinance, the Board concluded the ordinance might be vulnerable to constitutional challenge, and began to consider passing a second ordinance. The Board retained a lawyer to assist it with drafting a new ordinance. Counsel provided copies of the materials cited in the preamble to the First Ordinance, and also delivered a presentation on those materials. Multiple drafts were prepared and considered by the Board before it settled on a final text. On December 6, 2004, the Board held a public hearing, during which it solicited comment from interested parties. Especially vocal in his support of restricting sexually oriented businesses was Philip Cosby, a Dickinson County resident who led "Operation Daniel," a group that opposed The Lion's Den. Cosby noted that the draft currently before the Board, which set a distance requirement of 750 feet between sexually oriented businesses and any private residence, was insufficient to force The Lion's Den to move from it current location, which is approximately 1150 feet from the nearest residence. One week later,

on December 13, 2004, the Board voted to adopt Ordinance No. 121304A (the "Second Ordinance").

Relevant provisions of the Second Ordinance are as follows: (1) Owners of stores devoting more than 35 percent of the inventory or floor space to adult materials must obtain a license from the County; (2) The owner of a qualifying store must disclose certain financial information; (3) A license applicant must pay a one-time license fee of $100; (4) Judicial review of all adverse licensing decisions is available; (5) Sexually oriented businesses must be located no less than 1200 feet from any residence, school, house of worship, or other specified establishment; (6) Non-conforming sexually oriented businesses are allowed an amortization period of two years to achieve compliance; and (7) Such businesses may only be open between the hours of 6:00 a.m. and midnight. On March 28, 2005, the Board further amended the ordinance to set aside certain specific areas in the County where adult businesses could locate.

Like the First Ordinance, the Second Ordinance contains a lengthy preamble stating the Board's purpose in enacting it, as well as a list of the materials on which the Board relied. In particular, the preamble identifies numerous secondary-effects studies, all purporting to evidence the adverse impact of adult businesses on the neighborhoods in which they are located. Case precedent is included to establish the constitutional validity of the ordinance as enacted.[2]

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[2] The cases cited in the preamble to the Second Ordinance include the following: City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); City of Los Angeles v. Alameda Books, Inc.,

(continued...)

As noted above, it is undisputed that the Board

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[2](...continued)
535 U.S. 425 (2002); City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, 427 U.S. 50 (1976); California v. LaRue, 409 U.S. 109 (1972); Williams v. Attorney Gen. of Ala., 378 F. 3d 1232 (11th Cir. 2004); World Wide Video of Wash., Inc. v. City of Spokane, 368 F.3d 1186 (9th Cir. 2004); Heideman v. S. Salt Lake City, 348 F.3d 1182 (10th Cir. 2003); Ctr. for Fair Pub. Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003); Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220 (10th Cir. 2002); LLEH, Inc. v. Wichita County, 289 F.3d 358 (5th Cir. 2002); Essence, Inc. v. City of Federal Heights, 285 F.3d 1272 (10th Cir. 2002); Am. Target Adver., Inc.v. Giani, 199 F.3d 1241 (10th Cir. 2000); Connection Distrib. Co. v. Reno, 154 F.3d 281 (6th Cir. 1998); Sundance Assocs., Inc. v. Reno, 139 F.3d 804 (10th Cir. 1998); Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998); Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs, 98 F.3d 1262 (10th Cir. 1996); Cortese v. Black, 87 F.3d 1327 (10th Cir. 1996)(table); Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs, 32 F.3d 1436 (10th Cir. 1994); ILQ Invs. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994); O'Connor v. City & County of Denver, 894 F.2d 1210 (10th Cir. 1990); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983); Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County, 256 F. Supp. 2d 385 (D.Md. 2003); Sewell v. Georgia, 233 S.E.2d 187 (Ga. 1977). In addition, the preamble cites to studies commissioned by the following municipalities: Austin, Tex. (1986); Indianapolis, Ind. (1984); Garden Grove, Cal. (1991); Houston, Tex. (1983 & 1997); Phoenix, Ariz. (1979 & 1995-98); Chattanooga, Tenn. (1999-2003); Minneapolis, Minn. (1980); Los Angeles, Cal. (1977); Whittier, Cal. (1978); Spokane, Wash. (2001); St. Cloud, Minn. (1994); Littleton, Colo. (2004); Oklahoma City, Okla. (1986); Dallas, Tex. (1997); Greensboro, N.C. (2003); Amarillo, Tex. (1977); New York, N.Y. (1994). Finally, the preamble refers to the "Roncek, McCleary Expert Reports - 2004" and the "Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses, (June 6, 1989, State of Minnesota)."

considered at least some of these materials prior to its passage of the Second Ordinance. The extent to which they were considered, however, is an open question.

Abilene filed an amended complaint challenging the Second Ordinance on February 11, 2005. Shortly thereafter, the district court entered an order modifying the preliminary injunction to cover the Second Ordinance. The Board then moved for summary judgment on all of Abilene's claims, at which point pretrial discovery commenced. Both parties retained experts, who submitted conflicting testimony as to the validity of the secondary effects studies cited in the Second Ordinance. Abilene's expert, Daniel Linz, disputed the methodologies and findings of most of the studies on which the Board relied. The Board offered the testimony of its own expert, Richard McCleary, who testified that "a strong, empirically-validated criminological theory" supports the relationship between crime and adult businesses, and that the studies support the Board's stated rationale for enacting the Second Ordinance. Neither Linz nor McCleary are strangers to litigation challenging municipal zoning ordinances that target adult businesses - both have testified in many such cases.

Following extensive discovery, the district court issued an order on December 1, 2005, granting summary judgment in favor of Dickinson County.

II

We review the district court's findings of constitutional fact, conclusions of law, and grant of summary judgment regarding Abilene's First Amendment claims de novo, pursuant to the standard

provided in Federal Rule of Civil Procedure 56(c). Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 685 (10th Cir. 1998). Although we ordinarily review a district court's findings of fact for clear error, "[w]here First Amendment interests are implicated, this court is obligated to make an independent examination of the record in its entirety to ensure the challenged regulation does not improperly limit expressive interests." Id. We draw all "reasonable inferences from the record in the light most favorable to [Abilene]." Essence, Inc. v. City of Federal Heights, 285 F.3d 1272, 1283 (10th Cir. 2002).

It is now axiomatic that local governments may, within the confines of the First Amendment, adopt zoning ordinances regulating the location and operation of sexually oriented businesses. Such restrictions can be a valid exercise of municipalities' police powers. "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 62 (1976). Constitutionally valid motivations for such an ordinance include a desire to target the secondary effects of sexually oriented businesses, such as increased crime, neighborhood blight, and reduced property values. See City of Renton, 475 U.S. at 48. The Board must prove that the Second Ordinance is based on these proper motivations to survive First Amendment scrutiny. See City of Los Angeles v. Alameda Books, Inc., 535 U.S.

425, 438 (2002) (plurality);[3] Heideman v. S. Salt Lake City, 348 F.3d 1182, 1197 (10th Cir. 2003).

In Alameda Books, the Supreme Court offered its most recent comprehensive statement of the constitutional limitations on zoning ordinances that target adult businesses. When analyzing whether a time, place or manner regulation violates the First Amendment's guarantee of freedom of speech, we must first determine whether the ordinance is content based or content neutral. Alameda Books, 535 U.S. at 434. Ordinances targeting adult content per se are content based and are "considered presumptively invalid and subject to strict scrutiny." Id. Those targeting the negative secondary effects associated with sexually oriented businesses are considered content neutral, and subject to intermediate scrutiny. Id. They will "be upheld so long as the [municipality] show[s] that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available." Id. (citing City of Renton, 475 U.S. at 50).

A

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." Ward v. Rock Against Racism, 491

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[3]Hereinafter, citations to the Court's opinion in Alameda Books refer to the plurality opinion of Justice O'Connor unless otherwise noted.

U.S. 781, 791 (1989) (citation omitted). "If the regulation serves purposes unrelated to the content of expression it is considered neutral, even if it has an incidental effect on some speakers or messages but not others." Z.J. Gifts D-2, 136 F.3 at 686 (quotations and citations omitted). Accordingly, we are tasked with "verify[ing] that the predominate concerns motivating the ordinances were with the secondary effects of adult speech, and not with the content of the adult speech." Alameda Books, 535 U.S. at 440-41 (quotations and alterations omitted).

Relying on our content-neutrality analysis in Z.J. Gifts D-2, the district court "accept[ed] the County's statement in its preamble that the secondary effects of sexually oriented businesses prompted the Ordinance." Abilene challenges this finding, arguing that the predominant legislative purpose motivating both ordinances was an impermissible desire to suppress adult content. Abilene does not contend that the studies cited in the ordinance's preamble are insufficient to establish a legitimate purpose. Rightly so, as this circuit and other courts have consistently held the "evidentiary foundation" provided by such reports and the judicial opinions describing them is generally sufficient. See City of Erie v. Pap's A.M., 529 U.S. 277, 297 (2000) (plurality). So long as the materials are "reasonably believed to be relevant to the problem that the [municipality] addresses," we will presumptively classify the Board's legislative purpose as content neutral. Z-J Gifts D-2, 136 F.3d at 687.

Rather, Abilene weaves the following narrative from the record: After determining that the First Ordinance might not survive constitutional challenge, the Board considered a series of revised draft ordinances. For the first time, the Board reviewed the

cases and secondary effects studies listed in the preamble, but even then its review was cursory and incomplete. All of the drafts the Board considered prior to the enacted version contained distance requirements that would not have required The Lion's Den to move from its current location. At the final hearing before the Board passed the Second Ordinance, Cosby testified that only a distance requirement of 1200 feet or greater would force The Lion's Den's closure. As enacted, the Second Ordinance did set the distance requirement at 1200 feet. Ergo, by Abilene's logic, "the predominant legislative concern motivating the adoption of the new ordinance was not with ameliorating the secondary effects supposedly caused by sexually oriented businesses, but with the content of the material offered at [The Lion's Den]." Abilene advances a two-pronged argument. First, it contends the constitutional infirmities of the First Ordinance taint the Second Ordinance. Second, it argues that even the Second Ordinance, examined independently, was motivated by a distaste for sexually oriented businesses and the adult content sold therein.

With regard to the first argument, we need not reach the question of whether there is a dispute of material fact about the First Ordinance's content neutrality. Abilene cites no case law for the proposition that the motivations guiding legislators in passing one ordinance taint a separate, succeeding ordinance. Although none of the commissioners consulted the cases and studies cited in the preamble to the First Ordinance prior to its passage, they did review them before passing the Second Ordinance. They also viewed a presentation summarizing those materials. To punish the Board for redressing its

earlier failure would be a bizarre result, and we decline to so hold today.

As to Abilene's second claim, we note that the commissioners conducted at least a cursory review of the materials cited in the preamble before passing the Second Ordinance. Although Abilene takes issue with the degree of consideration the Board gave to those materials, we have never required legislators to engage in monastic rumination of cited cases and studies to establish their good-faith reliance on them. "[S]uch a holding would fly in the face of legislative reality." Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1258 (5th Cir. 1992).

Abilene also asks to impute Cosby's impermissible, content-based motives to the Board. It argues that Alameda Books requires us to look beyond the ordinance itself, to the facts and circumstances surrounding the Second Ordinance's passage. However, under City of Renton, we may "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 475 U.S. at 48. We find no language in Alameda Books that requires reconsideration of City of Renton's basic guidance.

Abilene urges us to adopt an approach that conflates Alameda Books' two-step test. Although a majority of the Alameda Books Court agreed that "the designation [content neutral] is imprecise," 535 U.S. at 444-45, and "something of a fiction," id. At 447-48, (Kennedy, J., concurring), a majority of the Court has never adopted Abilene's theory. See id. at 448 (Kennedy, J. concurring) ("[T]he central holding of Renton is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny."). Therefore, we must continue our prior practice of

segregating the two inquires. See Z.J. Gifts D-2, 136 F.3d at 687.[4]

Although we have never explicitly limited our review to the text of an ordinance when evaluating legislative purpose, Abilene asks us to engage in precisely the sort of subjective fishing expedition that City of Renton forecloses. See 475 U.S. at 48. Abilene asks us to go even further and impute the motives of a concerned citizen to the Board itself. This is despite the fact that many, if not most, ordinances regulating sexually oriented businesses are preceded by public hearings during which a wide variety of concerns, both "content neutral" and "content based," are voiced. See, e.g., Essence, 285 F.3d at 1286; Z.J. Gifts D-2, 136 F.3d at 685. We have never incorporated public comments into our determination of an ordinance's content neutrality, and decline to do so here.

Examining the preamble to the Second Ordinance, we are satisfied that the Board's predominant purpose in enacting it was to regulate the secondary effects of adult businesses. The Second Ordinance's stated goals are to: (1) "protect and preserve the health, safety, and welfare of the patrons of sexually oriented businesses as well as the citizens of the County;" (2) limit "unlawful sexual activities;" (3) minimize crime; and (4) "preserve the property values and character of surrounding neighborhoods

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[4]Abilene urges this conflation by reading our holding in Essence for the proposition that we look beyond the preamble when evaluating an ordinance's content neutrality. In that case we considered testimony from individual legislators in considering the city's interest in enacting the ordinance, not, as Abilene suggests, in determining the ordinance's content neutrality. See 285 F.3d at 1286.

and deter the spread of urban blight." As stated supra, Abilene does not dispute that the materials cited in the preamble are relevant to the stated purposes. Accordingly, we hold that the Board has met its burden of proof with respect to the content neutrality of the Second Ordinance.

B

Once a local government has established that its purpose in enacting a time, place, or manner regulation was legitimate, we apply the test set forth in City of Renton.[5] For a restrictive zoning ordinance to survive intermediate scrutiny it must be "designed to serve a substantial governmental interest and allow [ ] for reasonable alternative avenues of communication." City of Renton, 475 U.S. at 50. There is no question that a municipality's interests in mitigating the effects of crime, neighborhood blight, and other deleterious secondary effects "are both important and substantial." Young, 427 U.S. at 80 (Powell, J., concurring); see also Alameda Books, 535 U.S. at 434-36. We focus instead on whether the Second Ordinance is "designed to serve" those substantial interests.

In answering this question, we apply a burden-shifting approach. Alameda Books, 525 U.S. at 438-39. First, the Board must show that, in passing the Second

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[5]Courts may also apply the four-factor test articulated in United States v. O'Brien, 391 U.S. 367 (1968). The O'Brien test is, in practice, little different from the "time, place, or manner" test applied in City of Renton. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984); Z-J Gifts D-2, 136 F.3d at 688.

Ordinance, it relied on "evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial independent government interest." Id. at 438 (quotation omitted). Such evidence need not be so conclusive that the Board's secondary effects theory "is the only one that can plausibly explain the data," but must only "fairly support the [Board's] rationale." Id. at 437-38. Put in other terms, the Board's reading of the cited evidence must "appeal to common sense." Id. at 439. The Court cautioned, however, that local governments cannot "get away with shoddy data or reasoning." Id. at 438. If the Board can make this showing, Abilene may rebut the Board's proffered evidence "either by demonstrating that the [Board's] evidence does not support its rationale or by furnishing evidence that disputes the [Board's] factual findings." Id. at 438-39. "If [Abilene] succeed[s] in casting doubt on [the Board's] rationale in either manner the burden shifts back to the [Board] to supplement the record with evidence renewing support for a theory that justifies its ordinance." Id. at 439.

We are mindful that judicial review of an ordinance that implicates the First Amendment "is not a license to reweigh the evidence de novo, or to replace [legislators'] factual predictions with our own." Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 666 (1994). However, the Supreme Court has instructed that such deference to the legislative policymaking role nevertheless "does not foreclose our independent judgment of the facts bearing on an issue of constitutional law." Id. (quotation omitted). Our role is to "assure that, in forming its judgments [the legislature] has drawn reasonable inferences based on substantial evidence." Id.

Although it quoted the relevant burden-shifting language from Alameda Books, the district court misapplied the test required. Rather, the district court summarily found that the Board's evidence was sufficient to meet its initial burden, and focused instead on whether the Linz affidavit and studies cast doubt on the Board's rationale. Similarly, the parties devote the lion' share of their intermediate scrutiny arguments to the evidentiary battle waged between Linz and McCleary. We conclude, however, that a dispute of material fact exists as to whether the cases and studies cited by the Board are "reasonably believed to be relevant" to its interests, such that the Second Ordinance is "designed to serve" its goal of combating the secondary effects of Dickinson County sexually oriented businesses.

The Board's evidentiary support for the Second Ordinance consists entirely of cases and studies examining other locales' experiences with the secondary effects of sexually oriented businesses.[6] This lack of local evidence is not preclusive, as it is well settled that the Board may rely on foreign studies detailing the secondary effects of adult businesses in other areas. See City of Renton, 475 U.S. at 51-52. Nor is there a constitutional requirement that the studies relied upon be empirical or satisfy any particular methodological or scientific standards - legislators are free to consider anecdotal evidence, statistical data, prior cases, and their common sense. See Alameda

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[6]The Board did not rely on a local study of secondary effects attributable to The Lion's Den, nor does it argue that the record evidences an increase in secondary effects during the relevant period.

Books, 535 U.S. at 439-40; see also World Wide Video of Wash., Inc. v. City of Spokane, 368 F.3d 1186, 1195 (9th Cir. 2004). However, when a municipality chooses to rely solely on foreign evidence, "the experience elsewhere [must be] germane to the measure under consideration and actually relied upon." City of Erie, 529 U.S. at 313 (Souter,J., concurring).

In the case at bar, the studies relied upon include a wide variety of methodologies, both anecdotal and empirical, and are not easily summarized. Equally diverse are the studies' findings. Although most, if not all, find that adult businesses trigger at least some secondary effects in surrounding areas, the findings rest on a number of factors, including: the type of neighborhood in which the sexually oriented businesses are located,[7] the concentration of sexually

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[7]See, e.g., Austin City Council, Report on Adult Oriented Businesses in Austin 32 (1986) ("Sexually oriented businesses should be restricted to regionally oriented commercial zone districts. These districts are usually located along heavily traveled streets such as arterials and interstate highways, and are not normally near single-family neighborhoods.") [hereinafter "Austin Study"]; Dept. of Metro. Dev., Adult Entertainment Businesses in Indianapolis: An Analysis 26 (1984) ("There appears to be a strong correlation between crime frequency and the residential character of neighborhoods, i.e., the more residential the nature of the neighborhood, the greater is the instance of crime in that neighborhood."); Comm. on the Proposed Regulation of Sexually Oriented Businesses, Houston City Council, Legislative Report 26 (1983) ("A third set of problems identified during the hearings was the difficulties created when these businesses locate in areas that are primarily residential in character.") [hereinafter "Houston Study"].

oriented businesses,[8] and the nature of the sexually oriented business itself.[9] All of the studies relied upon by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examine businesses situated in an entirely rural area. To hold that legislators may reasonably rely on those studies to regulate a single adult bookstore,

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[8]See e.g., Houston Study at 26 ("A second set of problems brought out in the hearings is the detrimental effect that the clustering of such businesses can have on a surrounding area.") Marlys McPherson & Glen Silloway, An Analysis of the Relationship Between Adult Entertainment Establishments, Crime and Housing Values 82 (1980) ("[C]oncentrations of adult establishments should be encouraged only if a concentration of crime and housing value effects is also desirable.") [hereinafter "Minneapolis Study"]; Staff Report (Whittier City), Amendment to Zoning Regulations: Adult Businesses in C-2 Zone with Conditional Use Permit, Case No. 353.015, at 20 (1978) ("[C]oncentration of adult businesses in the City of Whittier have [sic] had an adverse impact on the adjacent neighborhoods.").

[9]See e.g., Minneapolis Study at 75 ("Different types of adult entertainment businesses are different in their relationships to crime and housing value. Some types of these businesses have significant relationships with crime or housing value; others do not."); Dept. of City Planning, City of Los Angeles, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles 1 (1977) ("[Survey respondents] feel that the degree of negative impact depends upon the degree of concentration and on the specific type of adult entertainment businesses."); Planning Dept., City of Amarillo, Tex., A Report on Zoning an Other Methods of Regulating Adult Entertainment in Amarillo 9 (1977) ("[T]hese street crimes were 2-1/2 times the City average in the immediate vicinity of alcohol only adult businesses, and 1-1/2 times the City average immediately surrounding businesses featuring alcohol and semi-nude entertainment.").

located on a highway pullout far from any business or residential area within the County, would be to abdicate our "independent judgment" entirely. Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business, of any type, located in any setting.[10] Our review is deferential, but the evidentiary basis for the Second Ordinance must establish some minimal connection to the secondary effects attendant to Dickinson County's existing

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[10]We decline to adopt the reasoning of the 5th Circuit on this point. In LLEH, Inc. v. Wichita County, that court addressed the constitutionality of Wichita County's reliance on a very similar set of studies to presume that secondary effects would result from the operation of a single sexually oriented business in a rural, unincorporated portion of the county. 289 F.3d 358 (5th Cir. 2002). The LLEH court bypassed the applicability of the cited studies to the county's single existing adult business, reasoning that the county might, "in its continued growth and development," experience a profusion of sexually oriented businesses and their attendant secondary effects. Id. at 367 (emphasis in original). To so hold would strip the Court's mandate in Barnes v. Glen Theatre, Inc. that a challenged ordinance serve "a current governmental interest" of any force whatsoever, as municipalities could merely point to a hypothetical future featuring more and differently situated sexually oriented businesses to justify their reliance on various studies. See 501 U.S. 560, 582 (Souter, J., concurring)' see also Essence, 285 F.3d at 1284 ("In order to prove a substantial interest in limiting the secondary effects on sexually oriented businesses, the governmental body must point to evidence of secondary effects at the time of enactment or evidence of current secondary effects."). Nothing, of course, prevents the Board or any other legislative body from reconsidering its zoning laws in the event it sees an uptick in the number of sexually oriented businesses locating in its jurisdiction.

sexually oriented business(es).[11] Based on the record before us, we conclude that a material dispute of fact exists as to whether the Board has established such a connection.

In so holding, we emphasize the wide contextual gulf between the facts of this case and those before the Court in Alameda Books. In that case, the City of Los Angeles relied primarily on a prior, local study of the secondary effects of adult businesses to support a narrow amendment to its zoning laws: the prohibition of "adult-oriented department store[s]," in which multiple, distinct adult businesses located within a single structure. 535 U.S. at 431. The amendment was adopted to close a loophole in the prior ordinance

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[11]To be sure, the Board's burden at this step is not heavy. We have previously characterized the burden at this initial step as "slight," see Doctor John's, Inc. v. City of Roy, 465 F.3d 1150, 1166 (10th Cir. 2006), and "minimal," see Heideman, 348 F.3d at 1198. See also Alameda Books, 535 U.S. at 451 (Kennedy, J., concurring) ("Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required."). Slight as this burden is, it is not pro forma, and may not be satisfied by any evidence whatsoever. Although we have held, post- Alameda Books, that prepackaged studies of the type adduced by the Board in this case satisfied a municipality's initial burden, see Doctor John's, 465 F.3d at 1165-66 & 1166 n.18; Heideman, 348 F.3d at 1199-1200, we have never held the relevance inquiry at any step to acontextual. In our view, the Board's reliance on these studies amounts to "shoddy...reasoning," see Alameda Books, 535 U.S. at 438, not because the studies permit a multitude of reasonable inferences to be drawn therefrom, but because they shed only the weakest light on the relevant question - whether the Board's interest in regulating existing Dickinson County adult businesses is substantial.

that otherwise required the dispersion of adult businesses.[12] See id. at 430. Reversing the judgment of the district court and the Ninth Circuit, the Court held that it was

> consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity... Under this view it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

Id. at 436.

Writing separately, Justice Kennedy concurred in the judgment, but emphasized that the application of intermediate scrutiny does not foreclose a reviewing court's inquiry into "how speech will fare under the ...ordinance." Id. at 450. (Kennedy, J., concurring) ("[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech."). He emphasized that although "a zoning law need not be blind to the

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[12]The prior ordinance prevented adult businesses from locating within 1000 feet of the closest exterior structural wall of another.

secondary effects of adult speech," its "purpose [may] not [be] to suppress it." Id. at 447. Determining that Los Angeles' effort to prohibit adult department stores was not designed to reduce the availability of adult content in the city, Justice Kennedy agreed with the plurality that the evidentiary basis for the amended ordinance was sufficient. See id. at 451.

By contrast, to the extent that we may identify a "premise" on which the Board relied in passing the Second Ordinance, it is that negative secondary effects are an attendant feature of all sexually oriented businesses, anywhere, and therefore Dickinson County's interest in regulating those effects is substantial. Justice Kennedy concurred with the Alameda Books plurality because the evidence upon which the City of Los Angeles relied was sufficient to support a narrowly-drawn, carefully-considered effort to limit secondary effects. In this case, we are not satisfied that the evidence relied upon by the Board is sufficient to permit summary judgment at the first step of Alameda Books.

Nowhere in the record or the Board's brief is an effort made to analogize the studies it relied upon to the current or anticipated secondary effects of sexually oriented businesses located in a rural county. Neither of the two expert reports commissioned by the Board so much as mention the specific features of either the First or Second Ordinance. Rather, the report submitted by Dennis Roncek is largely concerned with general, methodological flaws in several Linz studies; the McCleary report offers justifications for the methodologies used in some of the studies on which the Board relied and also refutes the Linz methodologies, but refers to the Second Ordinance only to say that it "is not substantially different than ordinances enacted

in other jurisdictions." See Richard McCleary, Expert Report 7; Dennis Roncek, Expert Report [hereinafter "Roncek Report"]. Myriad differences in the relied-upon studies' findings with respect to concentration, location, and type of business are passed over in silence. In particular, the Roncek Report highlights the correlation between secondary effects and the neighborhood in which a sexually oriented business is located, and states explicitly that "crime-related secondary effects of [sexually oriented businesses] are unlikely to cover the entire area of a county." Roncek Report at 11. Yet the report does not speak to how the locations permitted by the Second Ordinance might work to mitigate secondary effects in the County.

Moreover, the Second Ordinance plainly contemplates the closure of The Lion's Den in its existing location, a location that a common sense reading of the Board's studies suggests would best limit any secondary effects. See, e.g., Austin Study at 32 ("Sexually oriented business districts are usually located along heavily traveled streets such as arterials and interstate highways, and are not normally near single-family neighborhoods."). Nor can we glean any rationale from the materials relied upon by the Board for its decision to expand the setback requirement from 750 to 1200 feet, other than to specifically capture The Lion's Den. We need not impute an impermissible motive to the Board based on the fact that the Second Ordinance captures the Lion's Den. Nonetheless, we are not blind to the fact that the Second Ordinance's targeted application to a single, existing sexually oriented business differs substantially from the impact on speech contemplated in Alameda Books, in which the challenged ordinance was "just one part of an

elaborate web of land-use regulations in Los Angeles." See 535 U.S. at 447 (Kennedy, J., concurring).

Had the Alameda Books plurality and Justice Kennedy held that any municipality may reasonably rely on the existing body of prepackaged secondary effects studies to justify a zoning ordinance regulating local sexually oriented businesses, we would affirm the district court on this point. They did not, but instead reaffirmed municipalities' need to make a showing that the evidence on which they relied is germane to their local experience. We are therefore constrained to hold that a genuine dispute of material fact exists as to whether the evidence cited by the Board provides a sufficient connection between the continued operation of Dickinson County sexually oriented businesses and the negative secondary effects targeted by the Second Ordinance.[13]

III

Abilene brings a separate constitutional challenge to § 7(a) of the Second Ordinance, which ensures law enforcement officers' right to inspect the

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[13]Given our holding that a dispute of material fact exists as to whether the cases and studies cited by the Board are "reasonably believed to be relevant" to its interests, we need not reach whether Abilene has "cast direct doubt" on the rationale underlying the Second Ordinance. See Alameda Books, 535 U.S. at 438. Nor need we address Abilene's arguments with respect to narrow tailoring and facial overbreadth. Nevertheless, as noted above, we agree with Judge Ebel that if a dispute of material fact did not exist at step one of the Alameda Books burden-shifting inquiry, summary judgment would also be inappropriate at the second and third steps - thus we join the concurrence as an alternative basis on which to reverse and remand to the district court.

public areas of Dickinson County sexually oriented businesses during normal business hours. Section 7 (a) mandates that:

> Sexually oriented businesses and [their] employees shall permit the Administrator and his or her agents to inspect, from time to time on an occasional basis, the portions of the sexually oriented business premises where patrons are permitted, for the purpose of ensuring compliance with the specific regulations of this Chapter, during those times when the sexually oriented business is occupied by patrons or is open to the public. This section shall be narrowly construed by the County to authorize reasonable inspections of the licensed premises pursuant to this chapter, but not to authorize a harassing or excessive pattern of inspections.

Abilene challenges this provision on Fourth Amendment grounds. First, it argues that the inspections permitted by the provision are searches, insofar as § 7(a) permits law enforcement officers to enter the store as a matter of right, a privilege unavailable to ordinary customers. Second, it argues that adult bookstores are not "highly regulated," and therefore not subject to warrantless administrative searches. As such, Abilene argues, the search provision violates its reasonable expectation of privacy.

"[W]e review de novo the question of whether a search has occurred within the meaning of the Fourth Amendment." United States v. Nicholson, 144 F.3d 632, 636 (10th Cir. 1998). Analogizing the conduct

authorized by § 7(a) to that sanctioned by the Supreme Court in Maryland v. Macon, 472 U.S. 463 (1985), the district court held that § 7(a) did not implicate the Fourth Amendment at all; it therefore found no need to address Abilene's argument from case precedent addressing administrative searches of regulated businesses. We agree.

In Macon the Court addressed whether pornographic magazines purchased by undercover officers could be entered into evidence against the store clerk who sold them. Concluding that Macon "did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact the business," the Court held that "the officer's action... did not constitute a search within the meaning of the Fourth Amendment." Id. at 469; see also United States v. Katz, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."); United States v. Longoria, 177 F.3d 1179, 1183 & n. 2 (10th Cir. 1999) ("[W]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). In Macon the undercover agents did not enter the store as a matter of right, but rather as customers on the same footing with other members of the public. This notwithstanding, the distinction before us does not turn the type of access authorized by § 7(a) into a search prohibited by the Fourth Amendment.

Any fair reading of Macon requires us to conclude that Abilene's Fourth Amendment claim cannot turn on whether the Second Ordinance coveys access to officers as a matter of right, but must instead turn on whether Abilene has a reasonable expectation of privacy in the areas of the store § 7(a) entitles the

officers to inspect. Section 7(a) explicitly limits officers' rights of access to public areas of the store and to normal business hours; no special invasive search privileges are authorized. There is no barrier to officers entering any retail establishment during normal business hours to view those areas of the premises open to the public.[14] See Andy's Restaurant & Lounge, Inc. v. City of Gary, 466 F.3d 550, 557 (7th Cir. 2006) (upholding a nearly identical provision on similar grounds); see also Andree v. Ashland County, 818 F.2d 1306, 1314-16 (7th Cir. 1987) (holding that although officers demanded admission to public concert venue without paying, their inspection of public areas did not implicate plaintiffs' Fourth Amendment rights). The challenged provision compromises Abilene's "reasonable expectation of privacy" no more than conduct that survived Fourth Amendment scrutiny in Macon.

IV

As a final matter, Abilene appeals the district court's rejection of its claim that the Second Ordinance

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[14]Efforts to use § 7 (a) as anything more than a right of casual inspection of the premises could run afoul of the Fourth Amendment. See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 ("[T]here is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees."); Durham Video & News, Inc. v. Durham Bd. of Adjustment, 550 S.E.2d 212, 215 (N.C. App. 2001) (holding that officers' extended visit to an adult bookstore, during which they measured the store, recorded a video detailing the bookstore's inventory, and played portions of videos taken from the shelves, went beyond the activities of an ordinary customer and thus constituted a warrantless search).

violates its Fourteenth Amendment right to privacy, as identified in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). We review the district court's judgment with respect to an alleged violation of Abilene's Fourteenth Amendment rights de novo. See United States v. Oliver, 278 F.3d 1035, 1039 (10th Cir. 2001). Abilene argues that the Second Ordinance "impose[s] a substantial burden on the right to intimate privacy" by limiting individuals' right of access to martial aids. Abilene cannot cite to a single case, state or federal, that extends the substantive due process right identified in Carey and its progeny to the type of restrictive zoning ordinance at issue in this case. Rather, Carey stands for an entirely different proposition - "that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." Id. at 687. Abilene offers no support for the proposition that the relatively minimal burden imposed by a restrictive zoning ordinance should be compared to the much more severe burden at issue in Carey. Accordingly, on this claim we affirm the judgment of the district court. See Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992) (holding an argument forfeited if not supported by relevant authority or sound legal reasoning).

V

For the reasons stated above, the judgment of the district court is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for proceedings consistent with this opinion.

EBEL, J., concurring, and joined by **McWILLIAMS, J.**, and **LUCERO, J.**

I agree entirely with the result that the majority opinion reaches, and I join most of its reasoning. Along with the majority (Maj. Op. at 2), I conclude that Plaintiff-Appellant Abilene Retail #30, Incorporated's ("Abilene Retail") First Amendment claim should be remanded for a trial. I would reach this conclusion, however, at a different step in the analysis than does the majority.

Like the majority, I conclude that the County's challenged ordinance is a content-neutral time, place or manner restriction on speech protected by the First Amendment and, thus must pass intermediate scrutiny to be valid. (Maj. Op. At 15.) We inquire, therefore, whether the ordinance is "narrowly tailored to serve a significant government interest, and if it leaves open ample alternative channels of communication." Doctor John's, Inc. v. City of Roy, 465 F.3d 1150, 1164 (10th Cir. 2006) (quotation omitted); see also City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 50 (1986). The parties in this case do not dispute that the County's ordinance does leave open adequate alternative channels of communication. And "[i]t is well established that combating the secondary effects of adult businesses is a significant governmental interest." Doctor John's, 465 F.3d at 1164 (quotation omitted). The relevant question before us, therefore, is whether the County's ordinance is narrowly tailored to serve that interest. In addressing this question, we apply the burden-shifting evidentiary analysis set forth in City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434, 438-39 (2002) (plurality).

Alameda Books requires that Defendants-Appellees ("the County"), in justifying the restrictions the County has placed on protected speech, bear the

initial burden of presenting "evidence that is 'reasonably believed to be relevant' for demonstrating a connection between [the regulated] speech and a substantial, independent government interest." Id. at 438 (quoting City of Renton, 475 U.S. at 51-52); see also id. at 437. If the County is able to do so, the burden shifts to Abilene Retail to "cast direct doubt" on the County's "rationale, either by demonstrating that the [County's] evidence does not support its rationale or by furnishing evidence that disputes the [County's] factual findings" underlying its decision to enact the challenged ordinance. Id. at 438-39. If Abilene Retail "succeed[s] in casting doubt on the [County's] rationale in either manner, the burden shifts back to the [County] to supplement the record with evidence renewing support for a theory that justifies its ordinance." Id. at 439.

Although the majority in this case decides that the County has failed to meet its initial burden under Alameda Books (Maj. Op. At 18, 21-22, 26 n.13), I disagree. I would, however, go on to conclude that Abilene Retail has been able to "cast direct doubt" on the County's rationale sufficient to require a trial. It is on that basis that I would remand Abilene Retail's First Amendment claim.

I. Whether the County has met its initial burden of presenting evidence "reasonably believed to be relevant" to demonstrate a connection between its regulation of protected speech and a substantial government interest.

The County's stated purpose in enacting its ordinance restricting the location and operation of

sexually oriented businesses is to prevent the negative secondary effects stemming from such businesses.[1] Under Alameda Books, then, the County must assert evidence that it "reasonably believed to be relevant" to demonstrate a connection between that purpose and the ordinance the County enacted regulating protected speech. See 535 U.S. at 438. In this case, the County sought to justify its ordinance by citing to a number of judicial opinions from other cases, finding that sexually oriented businesses can have adverse secondary effects on their surrounding communities, as well as a number of "seemingly pre-packaged studies" of the secondary effects generally stemming from various types of sexually oriented businesses located in other cities and counties across the nation. Heideman v. S. Salt Lake City, 348 F.3d 1182, 1197 (10th Cir. 2003) (noting "it is common in these cases for cities to cite to and rely on seemingly pre-packaged studies, as

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[1]The ordinance states its underlying rationale to be the following:

It is the purpose of this ordinance to regulate sexually oriented businesses in order to promote health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize distribution of obscene material.

well as findings of courts in other cases"). Unlike the majority opinion, I would conclude that this evidence is sufficient for the County to meet its initial burden under Alameda Books.

Both the Supreme Court and this court have consistently recognized that the government's burden at this initial step in the Alameda Books' analysis is very light. See Alameda Books, 535 U.S. at 451 (Kennedy, J., concurring) (noting "that very little evidence is required" for the government to support the rationale on which its ordinance rests); Doctor John's, 465 F.3d at 1166 (noting government's initial burden is "slight"); Heideman, 348 F.3d at 1198 (suggesting "City's initial burden to present empirical support for its conclusions is minimal"); see also Alameda Books, 535 U.S. at 437-38, 439-40.[2]

> Our deference to the evidence presented by the [government] is the product of a careful balance between competing interests. On the one hand, we have an obligation to exercise independent judgment when First Amendment rights

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[2]Other circuits have likewise recognized that Alameda Books' initial burden is minimal. See Illusions-Dallas Private Club, Inc. v. Steen, 482 F.3d 299, (5th Cir. 2007) (noting that, although government must assert "some" evidence to meet its initial burden, that burden is "very light" and "minimal"); Zibtluda, LLC v. Gwinnett County ex rel. Bd. of County Comm'rs, 411 F.3d 1278, 1286-87 (11th Cir. 2005) (describing government's burden as "modest," "low," and not "rigorours"); World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186, 1194 (9th Cir. 2004) (noting government's evidence need not be overwhelming to meet its initial burden); R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 411 (7th Cir. 2004) (noting government's burden is "not particularly demanding").

> are implicated. On the other hand, we must acknowledge that the [local government] is in a better position than the Judiciary to gather and evaluate data on local problems.

Alameda Books, 535 U.S. at 440 (quotation, citations omitted.)

In order to meet its initial burden, therefore, the County need not conduct its own studies or "produce evidence independent of that already generated by other cities" in support of its ordinance, "so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses." City of Renton, 475 U.S. at 51-52; see also Doctor John's, 465 F.3d at 1164-65; Heideman, 348 F.3d at 1197.

Further, the County is not required to produce evidence "that rules out every [other] theory "linking the negative secondary effects at which its ordinance is aimed to other possible causes, apart from the presence of adult businesses. Alameda Books, 535 U.S. at 437. That is, the government does not have "to prove that its theory" linking the negative effects it seeks to eliminate to sexually oriented businesses "is the only [theory] that can plausibly explain the data" on which the County relies. Id. at 437-38. Nor does the government have to assert empirical data that shows that its ordinance will succeed in reducing the negative secondary effects at which it is aimed. See id. at 439. Government entities "must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech." Id. (quotation omitted).

Of course, "[t]his is not to say that [the government] can get away with shoddy data or reasoning. The [government's] evidence must fairly support [the] rationale for its ordinance." Id. at 438. The County's evidence does so here.

Courts have consistently upheld ordinances based upon the same type of evidence with which the County has initially supported its ordinance in this case. See City of Renton, 475 U.S. at 50-52 (upholding ordinance based upon a judicial opinion entered in another case discussing the negative secondary effects of sexually oriented businesses, and a study of such secondary effects conducted in another location); Heideman, 348 F.3d at 1197-98 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584 (1991) (Souter, J., concurring), and recognizing government can rely on court-made findings in other cases that sexually oriented businesses can have negative secondary effects). Moreover, this court has previously held that a local government met its initial burden under Alameda Books by relying upon prepackaged reports and case law almost identical to that relied upon by the County in this case. See Doctor John's, 465 F.3d at 1165-66 & 1165 n.17, 1166 n.18; Heideman, 348 F.3d at 1186-87, 1186 & n.5, 1199-1200. So have other circuits. See Andy's Restaurant & Lounge, Inc. v. City of Gary, 466 F.3d 550, 555 (7th Cir. 2006) (holding City met its burden by asserting "numerous studies evidencing the secondary effects of sexually oriented businesses"); Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees, 411 F.3d 777, 791 (6th Cir. 2005) (reh'g *en banc*) (holding township's evidence, twelves studies from different cities, as well as the township administrator's testimony of documented instances of intoxicated patrons causing serious trouble in adult

cabarets, was sufficient to support resolution requiring cabarets that do not serve alcohol to close at midnight); Zibtluda, 411 F.3d at 1286-87 (holding County sufficiently supported its ordinance by citing to studies from different locations, conducting a hearing at which the county commissioners heard citizens' testimony, as well as testimony from experts in law enforcement and economics); Gammoh v. City of La Habra, 395 F.3d 1114, 1126 (9th Cir. 2005) (holding City met its initial burden by relying upon judicial decisions in other cases, reports and studies from other jurisdictions, and testimony of the City's vice officers and nude dancers); Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 725-26 (7th Cir. 2003) (holding City met its initial burden by relying upon studies, reports and judicial decisions from other locations).

In fact, in the few cases in which courts have held that a government failed to meet its initial burden under the Alameda Books' burden-shifting analysis, the local government did not present any evidence at all justifying its decision to enact an ordinance regulating adult businesses. See Illusions-Dallas, 482 F.3d at 312-15 (holding State had failed to meet its "very light"initial burden because "the record is completely devoid of any evidence that a secondary effects problem exists or that the [challenged ordinance] furthers that interest"); White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 171-73 (2nd Cir. 2007) (holding town failed to meet its initial burden because defendants could "not show that they relied on relevant evidence of negative effects before enacting the Ordinance"); R.V.S., 361 F.3d at 411-13 (holding City had failed to meet its initial burden, which requires "very little evidence," because "[t]he record is devoid of evidence connecting [the adult

businesses] and the secondary effects that allegedly motivated the Ordinance's adoption"); Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1266-69 (11th Cir. 2003) (holding County had failed to meet its initial burden because "the record reveals that the Manatee County Board of County Commissioners, when enacting Ordinance 98-46, failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the County's interest in combating secondary effects").

Abilene Retail argues that the County's evidence in this case is insufficient even at this initial step in the analysis because the cases and reports upon which the County relies primarily concern adult businesses that offered only on-site, or both on- and off-site, adult entertainment, whereas Abilene Retail offers only off-site adult entertainment. But at this initial stage in the analysis, those distinctions are of no moment, so long as the County could reasonably believe the reports and case law upon which it relied were relevant to demonstrate that the County's regulating sexually oriented businesses will reduce adverse secondary effects on the community. See Doctor John's, 465 F.3d at 1165-69 (citing Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998)). The County can meet its "slight initial burden, even if the studies" on which it relies do not address sexually oriented businesses "precisely like" Abilene Retail's store. Id. at 1166.

The majority would conclude that the County's pre-packaged studies and case law are insufficient to meet the County's initial evidentiary burden because the County's evidence concerns local governments' experiences with sexually oriented businesses in an

urban setting, while the County is a rural, sparsely populated area. This may be a valid distinction to draw at the later stages of the Alameda Books' analysis. Notwithstanding our obligation in the First Amendment context "to make an independent examination of the record in its entirety to ensure the challenged regulation does not improperly limit expressive interests," Z.J. Gifts, 136 F.3d at 685, I do not think that this rural/urban distinction is sufficient at the initial stage of analysis. The evidence the County asserted was sufficient to permit the County to draw the reasonable conclusion that the secondary effects that other communities across the country have experienced related to sexually oriented businesses would also occur in this County. That is all Alameda Books requires at this initial analytical step. In fact, in Alameda Books, the Supreme Court held that the circuit court had erred in not permitting the local government, at this initial stage in the analysis, to draw a reasonable inference from the evident it had before it, even though there were other reasonable explanations of the evidence and other reasonable inferences that the government could have drawn instead.[3] See Alameda Books, 535 U.S. at 436-38. A

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[3]Alameda Books considered the validity of the City of Los Angeles' ordinance prohibiting "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." 535 U.S. at 429 (quotation omitted). To justify this restriction, the City relied upon a study conducted by the Los Angeles police department indicting that, during a ten-year period, "certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole." Id. at 435. The circuit court reviewing this ordinance held

(continued...)

local government, therefore, can meet its "slight initial burden, even if the studies" on which it relies do not address sexually oriented businesses "precisely like" those being regulated by the challenged ordinance. Doctor John's, 465 F.3d at 1166.

For these reasons, then, I conclude that, in this case, the County has presented sufficient evidence, linking its ordinance restricting the location and operation of sexually oriented businesses to the County's substantial interest in eliminating adverse

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[3](...continued)
that this study did not reasonably support the City's enacting an ordinance prohibiting more than one adult establishment in the same building, because the study did not address that particular circumstance. See id. The Supreme Court, however, concluded that the circuit court had erred in refusing to allow the city to draw this reasonable inference from that study, even if the study might also support drawing other reasonable inferences. See id. at 436-38. "The Court of Appeals' analysis... implicitly requires the city to prove that its theory is the only one that can plausibly explain the data. Id. at 437-38. The Court concluded this was error, and further indicated that it is instead up to those challenging the ordinance to "provide evidence that refutes the city's interpretation of the study." Id. at 438.

Similarly, in this case, the County can reasonably infer that the adverse secondary effects that other, more urban communities have experienced in relation to sexually oriented businesses would also occur in the County's more rural, less populated community. That is sufficient for the County to meet its minimal initial evidentiary burden under Alameda Books and shifts the burden to Abilene Retail to present evidence challenging the County's interpretation of the law and reports upon which the County relies.

secondary effects stemming from such businesses, to meet its minimal initial burden under Alameda Books.[4]

II. Whether Abilene Retail was able to cast direct doubt on the County's rationale underlying its decision to enact the challenged ordinance.

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[4]If, as the majority instead concludes, the County has failed to meet its initial burden, then the result would not be to remand this claim for trial, as the majority does. (Maj. Op. at 18, 21-22, 26 n.13 (holding that the County has failed to meet its initial burden and so there is a dispute of material fact as to whether the County could reasonably believe that the evidence on which it relied to justify enacting the challenged ordinance was relevant).) In that case, there would be no genuinely disputed factual issue to be tried. Rather, if the County has failed as a matter of law to meet its initial burden of asserting some minimal evidence connecting the ordinance it enacted with the County's stated objective to eliminate adverse secondary effects stemming from adult businesses, then the evidentiary burden under Alameda Books would never shift to require Abilene Retail to produce evidence creating a genuinely disputed factual issue. The ordinance would instead simply be invalid. See White River Amusement Pub, 481 F.3d at 165, 173 (affirming summary judgment for the plaintiff, where the government failed to prove its legislative body actually considered the evidence on which the government relied to justify its ordinance); R.V.S., 361 F.3d at 404, 411-13, 415-16 (holding that government had failed to present sufficient evidence during bench trial to meet its initial burden; remanding for entry of judgment after concluding ordinance, therefore, violated First Amendment); Peek-A-Boo Lounge, 337 F.3d at 1269 & n.18 (reversing judgment entered for County and sustaining plaintiffs' First Amendment challenge); Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 295 (5th Cir. 2003) (striking down ordinance after holding that City had failed to assert any evidence to justify its enactment). But, as I have indicated, the County in this case did not fail to meet its minimal initial burden.

Because the County has met its initial burden under Alameda Books, the burden shifts to Abilene Retail to "cast direct doubt" on the County's rationale underlying its ordinance. Abilene Books, 535 U.S. at 438. Abilene Retail can do so in one of two ways. See id. at 438-39. It can demonstrate that the County's evidence does not support its rationale that restricting the location and operation of adult businesses reduces the adverse secondary effects resulting from sexually oriented businesses. See id. Or Abilene Retail can furnish evidence that disputes the County's factual findings justifying its ordinance. See id. at 439. In this case, Abilene Retail has been able to do both.

A. Whether Abilene Retail was able to demonstrate that the County's evidence does not support the rationale underlying the County's ordinance.

The County's rationale in enacting this challenged ordinance, based upon the case law and studies the County had before it, is that sexually oriented businesses can cause negative secondary effects on the surrounding community, and the restriction that the County's ordinance places on sexually oriented businesses is narrowly tailored to prevent those adverse effects. Abilene Retail challenges that rationale that the County has drawn from the County's pre-packaged evidence by presenting its own evidence indicating instead that sexually oriented businesses do not cause the adverse secondary effects the County fears. Specifically, Abilene Retail offers the opinion of its expert witness, Dr. Daniel

Linz, Ph.D. Dr. Linz has conducted five studies of his own indicating that sexually oriented businesses do not produce the negative secondary effects that the County sought to prevent by enacting its ordinance.[5] More importantly, perhaps, Abilene Retail also presented evidence that its store has in fact not produced any of the negative secondary effects that the County's ordinance was designed to eliminate.[6] Cf. Peek-A-Boo Lounge, 337 F.3d at 1270 (concluding plaintiffs had successfully cast direct doubt on the County's rationale by presenting evidence of the

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[5]Interestingly, Dr. Linz's studies took place primarily in urban areas; Charlotte, North Carolina; Ft. Wayne, Indiana; San Diego, California; sixty-seven Florida counties; and Dayton, Ohio.

[6]The County enacted its first ordinance regulating sexually oriented businesses within a year of Abilene Retail's opening its store. As a result, Abilene Retail commenced this litigation. The County then amended its ordinance, and Abilene Retail amended its complaint to challenge the new ordinance. It is only this amended ordinance that is at issue now in this case. Throughout this litigation, the County has agreed to stay enforcing these challenged ordinances until the courts resolve their validity. So Abilene Retail has operated its adult retail store in an unrestricted manner for several years. Abilene Retail presented evidence tending to prove that during this time, its store has not produced any of the secondary effects that the County seeks to eliminate through its regulation of sexually oriented businesses.

Of course, the County "need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses." Z.J. Gifts, 136 F.3d at 688. But, in this case, the County's actually experience with Abilene Retail's store offers some corroboration of Abilene Retail's evidence suggesting that sexually oriented businesses do not produce the negative secondary effects that the County fears.

County's actual experience with adult businesses, which contradicted the evidence on which the County had relied). This evidence is sufficient to cast direct doubt on the County's evidence on which the County based its rationale that regulating sexually oriented businesses will eliminate the adverse secondary effects those businesses cause.[7]

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[7]Abilene Retail also challenges the County's rationale by pointing out that the County's case law and pre-packaged reports primarily address adult establishments offering only on-site entertainment, or both on- and off-site entertainment, or concerned studies that did not differentiate between the secondary effects caused by on-site versus off-site adult entertainment. Abilene Retail argues that such evidence does not support the County's rationale that it needs to regulate off-site adult businesses to the same extent it regulates on-site establishments. By this argument, Abilene Retail argues that, based upon the County's evidence, the County's ordinance is not narrowly tailored to serve the County's substantial interest in combating the secondary effects of sexually oriented businesses. See Doctor John's, 465 F.3d at 1166. While we have concluded that this on-site/off-site distinction is not relevant at the initial stage of the Alameda Books' analysis, in Doctor John's we acknowledged that "a distinction between on-site and off-site businesses might be relevant in the Alameda Books burden shifting framework." Doctor John's, 465 F.3d at 1168. Nonetheless, like the plaintiff in Doctor John's, Abilene Retail failed to point to any evidence "that its type of adult business (e.g., 'off-site') is relevantly different than those types of businesses analyzed in the studies supporting the ordinance (e.g., 'on-site')." Id. "Simply stating that off-site businesses are different from on-site businesses is not sufficient to shift the burden back to the [government]." Id.

It would be at this stage in the analysis that Abilene Retail might also present evidence indicating that sexually oriented businesses in rural settings "have materially different

(continued...)

B. Whether Abilene Retail was able to furnish evidence disputing the County's factual finding justifying its ordinance.[8]

In addition to the five studies on which Abilene Retail relies to show that sexually oriented businesses do not cause the negative secondary effects that the County fears, Abilene Retail also presented evidence calling into doubt the validity of the County's legislative factual findings indicating adult businesses do cause adverse secondary effects.[9] Specifically,

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[7](...continued)
secondary effects" than the urban areas addressed in the County's case law and pre-packaged reports. Id. But Abilene Retail has never itself drawn that distinction, let alone presented any evidence to support that distinction. See id. at 1168.

[8]I recognize the considerable overlap between this inquiry and the previous one.

[9]In enacting the challenged ordinance, the County specifically found the following, based upon the cases and reports it had before it:

> (1) Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on property values, urban blight, litter and sexual assault and exploitation.
>
> (2) Sexual acts... sometimes occur inside the
>
> (continued...)

Abilene Retail presented the opinion of its expert, Dr. Linz, that the studies and reports on which the County relies are invalid or at least unreliable. In offering that opinion, Dr. Linz addresses each of the County's reports and studies individually and points to specific problems he sees with each study or report that call its results or conclusions into question. Furthermore, Dr. Linz has bolstered this opinion with an academic, peer-reviewed article that he wrote with others challenging the validity of the County's studies. This evidence, too, sufficiently casts direct doubt on whether the County could have reasonably believed its own evidence, underlying the County's legislative findings, was relevant to justify enacting the challenged ordinance.

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[9](...continued)
premises of or in the parking lot of unregulated sexually oriented businesses, including but not limited to those which provide private or semi-private booths, rooms, or cubicles for viewing films, videos, or live sexually explicit shows, which acts pose a risk to public health through the spread of sexually transmitted diseases.

(3) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.

(4) Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating, and said substantial interest exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses.

Cf. Peek-A-Boo Lounge, 337 F.3d at 1271 n. 20 (relying in part on similar evidence to conclude that the plaintiffs had created a genuinely disputed issue of material fact sufficient to survive summary judgment.)

C. Conclusion

For the foregoing reasons, I would conclude that Abilene Retail's evidence is sufficient to cast direct doubt on the County's rationale underlying its decision to enact the challenged ordinance restricting the location and operation of sexually oriented businesses, in an effort to eliminate the adverse secondary effects that adult businesses cause. That is particularly true given that, in reviewing summary judgment decisions, we must "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Reeves v. Churchich, 484 F.3d 1244, 1250 (10th Cir. 2007) (quotation omitted), which in this case is Abilene Retail.

III. Whether the County was able to supplement the record with evidence renewing support for a theory that justifies its ordinance.

At this point in the Alameda Books' analysis, the burden shifts back to the County "to supplement the record with evidence renewing support for a theory that justifies its ordinance." 535 U.S. at 439. The County has done so in this case, offering one of its expert witness's opinion that the studies and opinions of Abilene Retail's expert, Dr. Linz, are themselves invalid and unreliable. The County's expert, Dr. McCleary, further responds that the reports on which

the County relies, including at least one study conducted by Dr. McCleary himself, are valid and reliable. While the County's evidence, then, does supplement the other evidence it relied upon to justify enacting the challenged ordinance, this supplemental evidence, rather than resolving the evidentiary dispute in this case, further exacerbates it.

This is best illustrated by the arguments the County asserts in challenging Abilene Retail's evidence. The County argues, for example, that Abilene Retail's expert, Dr. Linz, has conducted only "industry-funded studies," is not a credible witness, and has been found so by several courts in other cases. But, at the summary judgment stage of litigation, a court cannot decide that Dr. Linz (or Dr. McCleary, for that matter) is not a credible witness. See Norton v. City of Marietta, 432 F.3d 1145, 1154 (10th Cr. 2005) (per curiam). Such a credibility determination requires a trial and a fact finder charged with making such determinations. See Plotke v. White, 405 F.3d 1092, 1103 (10th Cir. 2005). The battle of the experts that the parties present to us requires a trial and a trier of fact to resolve. See Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005); Goldman v. Standard Ins. Co., 341 F.3d 1023, 1036 (9th Cir. 2003); Michaels v. Avitech, Inc., 202 F.3d 746, 752 (5th Cir. 2000).

IV. Conclusion

The Supreme Court has declared that whether a community's ordinance regulating sexually oriented businesses is narrowly tailored to serve a substantial government interest is an evidentiary question. Alameda Books, 535 U.S. at 437-42; City of Renton, 475 U.S. at 50-52; see Heideman, 348 F.3d at 1197

(noting that "[t]he standard for the quantity and nature of empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general... are continuing to evolve"); see also Illusions-Dallas, 482 F.3d at 312-15; Fantasy Rancy, Inc. v. City of Arlington, 459 F.3d 546, 559 (5th Cir. 2006); R.V.S., 361 F.3d at 408. Applying that Supreme Court precedent to this case, I conclude the County has met its initial burden of producing some evidence linking its ordinance restricting the location and operation of sexually oriented businesses with the County's stated goal of preventing the secondary effects caused by such businesses. But I further conclude that Abilene Retail has been able to assert sufficient evidence of its own, contradicting and disputing the validity of the County's evidence and, thus, the County's rationale underlying its ordinance, to create a triable evidentiary dispute. And the supplemental evidence that the County offered is not sufficient to dispel this triable evidentiary dispute. I reach this conclusion even while recognizing that the issue to be presented at trial is not whether sexually oriented businesses do, in fact, cause secondary effects that the County seeks to eliminate through its ordinance, but rather only whether the County's Board of Commissioners had evidence from which it could reasonably infer that sexually oriented businesses may cause adverse secondary effects in the surrounding community, and that its ordinance restricting adult businesses is narrowly tailored to eliminate those adverse effects.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ABILENE RETAIL #30, INC.,

Plaintiff - Appellant,

v. No. 05-3473

BOARD OF COMMISSIONERS OF DICKINSON COUNTY KANSAS; KEITH D. HOFFMAN,

Defendants-Appellees.

ORDER

Filed October 25, 2007

Before **TACHA**, Chief Judge, **KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNEL, TYMKOVICH, GORSUCH,** and **HOLMES,** Circuit Judges.

The appellees' petition for rehearing is denied by the panel that rendered the decision in this case.

The suggestion for rehearing *en banc* was transmitted to all judges of the court who are in regular active service. A poll was requested and a majority of the active judges voted to deny rehearing *en banc*. Chief Judge Tacha and Judges Kelly, O'Brien, Tymkovich and Gorsuch voted to grant

rehearing. Judge Gorsuch filed a dissent from the denial of rehearing *en banc*, and he was joined in this dissent by Judge Kelly. Judge Lucero filed a response to the dissent. The dissent and response are attached and incorporated in this order.

ENTERED FOR THE COURT

s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

05-3473, *Abilene Retail #30, Inc. v. Bd. of Comm'rs of Dickinson County, Kan.*
GORSUCH, J., joined by **KELLY, J.**, dissenting from denial of rehearing *en banc*.

While the panel grappled admirably with this difficult and consequential case, I respectfully submit it warranted plenary review given its legal and practical significance.

Legally, the significance of this case is illustrated by the fact that it opens not one, but two, splits with our sister circuits on important questions of law concerning the amount of judicial deference due legislative judgments. First, the panel opinion sets a new and much higher burden for municipalities under *Alameda Books* Step 1 than has any other circuit court, and in the process creates a circuit split with the Fifth Circuit. *See* Concurrence Part I; Maj. Op., 492 F.3d at 1175 n.10 (discussing *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002)).[1] Second, unlike our sister circuits which afford substantially more judicial deference to legislative judgments, the concurrence's treatment of *Alameda Books* Steps 2 and 3 effectively allows a jury to "veto" legislation whenever it concludes, by a preponderance of the evidence (that

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[1]There is no question that *LLEH* remains good law in the Fifth Circuit after *Alameda Books*. *See Fantasy Ranch, Inc. v. Arlington, Tex.*, 459 F. 3d 546, 562 (5th Cir. 2006). If anything, in *Fantasy Ranch* the Fifth Circuit went further than it had in *LLEH* in upholding a municipality's purely predictive judgment about potential future secondary effects at Step 1; in *Fantasy Ranch*, the municipality had *no* pre-enactment empirical evidence supporting the existence of secondary effects and a post-enactment records search revealed *no* arrests involving the city's targeted secondary effects. *Id.* at 559-61.

is, ≥50.0001%), that the legislature's chosen path is erroneous. *Compare* Concurrence Parts II & III *with Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 881 (11th Cir. 2007), *G.M. Enters , Inc. v. Town of St. Joseph, Wisc.*, 350 F.3d 631, 639 (7th Cir. 2003), *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *and Fantasy Ranch*, 459 F.3d at 561.[2] Such a holding also arguably renders *Alameda Books* Step 1 superfluous (why bother asking if the legislature's evidence was merely rationally related to its enactment when a jury can reject that enactment

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[2]The *facts* of these cases are beside the point. The conflict concerns a pure question of law. Our sister circuits evaluate any evidence proffered at Steps 2 and 3 under a *legal* test far more deferential than the legal test set forth by our panel. Unlike the concurrence, our sister circuits will not allow factfinders to "re-weigh the evidence considered by a legislative body" or "substitute [their] judgment in regards to whether a regulation will best serve a community"; so long as a legislature considered evidence "reasonably believed to be relevant to the problem addressed," courts in those circuits will not "vitiate the result reached in the ... legislative process." *G.M. Enters.*, 350 F.3d at 639-40; *see also Daytona Grand*, 490 F.3d at 881; *Gammoh*, 395 F.3d at 1126; *Fantasy Ranch*, 459 F.3d at 561. Even if the facts were (somehow) relevant to a split on a purely legal question, the presence or absence of "local" evidence of extant empirical effects is *not* dispositive under settled Supreme Court precedent, *see City of Renton*, 475 U.S. at 51-52, a point the panel itself expressly acknowledges. *See* Maj. Op., 492 F.3d at 1174. Neither can it be said that the evidence before our court was unique in this respect. *See, e.g., Fantasy Ranch*, 459 F.3d at 559 (finding sufficient evidence even in the face of no pre-enactment empirical evidence and post-enactment empirical data indicting no secondary effects).

with a finding that a preponderance of the evidence does not support it).[3]

Factually, this case is of great practical importance to the large numbers of rural counties and municipalities within our reach. Rural jurisdictions within the Tenth Circuit will be unable to rely on existing empirical "urban" studies to regulate the secondary effects of adult businesses and will be forced to meet new, unique, and significantly higher legal burdens not imposed on their counterparts in other areas of the country. *See* Maj. Op., 492 F.3d at 1175 ("To hold that legislators may reasonably rely on those [urban] studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County, would be to abdicate our 'independent judgment' entirely.")[4]

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[3]The holding in this case indisputably rests in part on the concurrence. All three panel members joined the concurrence, giving it no less force than if it had been included in the majority opinion itself. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."). Moreover, the panel remanded this matter for trial, and the jury will be instructed on the concurrence's understanding of *Alameda Books* Steps 2 and 3. Every future secondary effects dispute in this circuit likewise will be measured against the concurrence's standards for Steps 2 and 3.

[4]It does not suffice to suggest that the county may rely on evidence local police departments gather after a business has opened. We have specifically said that a municipality "need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses." *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 688 (10th Cir. 1998); Maj. Op., 492 F.3d at 1186 n.6. Instead,

(continued...)

Though I can hardly say how I would have voted on the ultimate outcome of this case – for example, the county would still have had to show that its ordinance, even if a justified response, was narrowly tailored at *City of Renton* Step 3 – all of these reasons suggest to me that this case is of sufficient legal and practical significance that its resolution merited the attention of the full court.

LUCERO, J., responding to the dissent from denial of rehearing *en banc*.

I write briefly to respond to my dissenting colleagues' arguments that *en banc* review was appropriate in this case. In doing so, I note that a potential circuit split, in and of itself, is not a reason to grant *en banc* review under our local rules. See 10th Cir. R. 35.1(A) ("*En banc* review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel

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[4](...continued)
municipalities "may rely on the experience of other cities to determine whether the harms presented by sexually oriented businesses are real and should be regulated." *Z.J. Gifts*, 136 F.3d at 688. In this case, moreover, the legislature *did* analogize between the documented experience of urban areas and what it anticipated would occur in its jurisdiction; indeed, such an analogy formed the very basis of its decision. *See, e.g.*, Dickinson Cty. Ordinance No. 121304A (citing urban studies and basing its decision on the anticipation of similar effects in Dickinson County). The problem was that the panel, applying far less deferential standards than our sister circuits, *rejected* the legislature's analogy: "All studies relied upon by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examine[s] businesses situated in an entirely rural area." Maj. Op., 492 F.3d at 1175.

decision that conflicts with a decision of the United States Supreme Court or of this court" (emphasis added)).

Regardless, the panel opinion does not create a circuit split with the Fifth Circuit decision in LLEH, Inc. v. Wichita County, 289 F.3d 358 (5th Cir. 2002). Three weeks after the LLEH decision, the Supreme Court handed down City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002). In clarifying the burden that a local government must meet at Step One of the Renton evidentiary inquiry, Alameda Books supercedes LLEH, and our panel opinion is predicated upon that holding. No Fifth Circuit case has since relied on the LLEH court's interpretation of Step One. Cf. Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546, 559-62 (recognizing that Alameda Books controlled its Renton analysis, but applying the narrow tailoring inquiry from LLEH because "[t]he question of narrow tailoring was not before the Court in Alameda Books").

The four cases cited by the dissent as evidence of a circuit split with the panel's alternative holding are distinguishable, and particularly so when the concurrence is read in concert with the majority opinion. In each of the cited cases, the evidence produced by the local government at Step One was both more substantial and more contextual than that produced by Dickinson County. Unlike the present case, each of our sister circuits had local evidence before it in addition to the commonly cited studies.[5]

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[5]See Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860, 876-77 (11th Cir. 2007) (city relied on "its own experiences" alongside studies and cases); Fantasy Ranch, 459

(continued...)

Thus, in order to meet their burden to overcome that Step One evidence, the regulated businesses would have had to produce more evidence to prevail at Step Two than the Lion's Den did here. In other words, none of our sister circuits in these cases faced as close an evidentiary question as that presented herein.

Finally, rural governments are not precluded by the panel opinion from relying upon urban studies in appropriate contexts. See Abilene Retail #30, Inc. v. Bd. of Comm'rs, 492 F.3d 1164, 1177 (10th Cir. 2007) (stressing county's failure to "analogize the studies it relied upon to the current or anticipated secondary effects of sexually oriented businesses located in a rural county" (emphasis added)). Additionally, cities are permitted to rely on evidence garnered from local police departments or other local experts, and need not commission formal studies. See Alameda Books, 535 U.S. at 435 (plurality opinion) ("[A] police department report's conclusions regarding crime patterns may reasonably be relied upon...").
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[5](...continued)
F.3d at 559-60 (5th Cir. 2006) (city relied on post-enactment evidence including at least one study conducted "within the City of Arlington" alongside foreign studies and cases); Gammoh v. Cityof La Habra, 395 F.3d 1114, 1126 (9th Cir. 2005) (city council relied on "declarations from investigating vice officers" alongside studies and cases); G.M. Enters, Inc. v. Town of St. Joseph, 350 F.3d 631, 633-34 (7th Cir. 2003) (board "considered police reports" about local businesses alongside studies and cases). Although the presence of local evidence is not dispositive, it is indicative of higher production at Step One and a correspondingly higher Step Two burden.

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ABILENE RETAIL # 30, INC.,

Plaintiff,

v. **Case No. 04-2330-JWL**

THE BOARD OF COMMISSIONERS OF DICKINSON COUNTY, KANSAS, and KEITH D. HOFFMAN,

Defendants.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

This case involves a claim by Abilene Retail (doing business as The Lion's Den Adult Superstore) against officials of Dickinson County ("the County"), Kansas, for declaratory and injunctive relief against the County's Ordinance No. 121304A ("the Ordinance"). The Ordinance is a zoning provision that regulates The Lion's Den, a sexually oriented business located in Dickinson County. This matter comes before the court on the County's motion for summary judgment (doc. #48). For the reasons explained below, the motion is granted.

STATEMENT OF MATERIAL FACTS[1]

In 2003, Abilene Retail opened the Lion's Den Adult Superstore in Dickinson County, which has a population of roughly 6,100. The Lion's Den sells hundreds of sexual devices, and at least 90% of its inventory is sexually explicit items, materials, or devices. It is the only sexually oriented business in Dickinson County.

In July 2004, the County passed Ordinance No. 070804, which regulated sexually oriented businesses. Abilene Retail immediately challenged that ordinance. The parties agreed to non-enforcement against Abilene Retail, and that ordinance was soon repealed by the passage of a new ordinance at the end of 2004.[2]

Dickinson County passed the new ordinance, Ordinance No. 121304A, on December 13, 2004. It substantially limited the scope of the previous zoning ordinance. Among its provisions regulating sexually oriented businesses in Dickinson County, it (1) increased the threshold of sexually oriented merchandise to 35%; (2) increased the threshold of ownership interest to 30%; (3) provided for judicial review of any licensing dispute and provisional licensing pending any judicial review; (4) reduced the distance limitations from 1,500 feet to 1,200 feet; (5) eliminated all restrictions against signage advertising;

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[1]Consistent with the established standard for summary judgment, the following facts are either uncontroverted or stated in the light most favorable to the nonmoving party.

[2]Abilene Retail did challenge Ordinance No. 070804 in its complaint, but the parties now agree this challenge is moot.

and (6) prohibits sexually oriented businesses from operating between midnight and 6 A.M.

About one week before the commissioners passed the new ordinance, they received testimony at a public hearing. They also reviewed reports and studies, case law, and legislative evidence on the secondary effects of sexually oriented businesses. Reflecting on these efforts, the new ordinance included in its preamble nearly four pages explaining that the Ordinance's purpose is to regulate the secondary effects of sexually oriented businesses. Notably, it discussed 27 court cases affirming the secondary effects of sexually oriented businesses, including guidance in *Z.J. Gifts D-2, L.L. C. v. City of Aurora,* 136 F.3d 683 (10th Cir. 1998). It also discussed 22 reports verifying these secondary effects, including 7 reports cited affirmatively by the Tenth Circuit in *City of Aurora. See id.* at 687, n. 1. Later, in March 2005, the County passed Ordinance No. 032805. It designated ten available areas for sexually oriented businesses to locate in Dickinson County.

Abilene Retail disputes that the County actually relied on any of the cases or reports documenting the secondary effects of sexually oriented businesses. In support, it points to parts of the record where the commissioners could not clarify their understanding or specific reliance upon the cases and reports at issue. During the course of litigation, it retained an expert witness, Dr. Linz, who substantially questions the methodology underlying many of the reports cited by the County. In turn, the County retained its own expert, Dr. McCleary, who largely refuted Dr. Linz's allegations. The County also identified several federal cases that have rejected Dr. Linz's arguments as legally insignificant under the established framework

for upholding a zoning ordinance that regulates sexually oriented businesses.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material of fact" and that it is "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir. 2002). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim," *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler*, 144 F.3d at 670 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The moving party initially must show the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Spaulding*, 279 F.3d at 904 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In attempting to meet this standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Adams v. American Guarantee & Liability Ins.*

Co., 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Adler*, 144 F.3d at 671).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is genuine issue for trial." *Spaulding*, 279 F.3d at 904 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *Anderson*, 477 U.S. at 256; *Celotex*, 477 U S. at 324. The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256; *accord Eck v. Parke, Davis & Co.*, 256 F3d, 1013, 1017 (10th Cir. 2001). Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1197-98 (10th Cir. 2000) (quoting *Adler*, 144 F.3d at 671). To accomplish this, the facts "must be identified by reference to an affidavit, a deposition, transcript, or specific exhibits incorporated therein." *Adams*, 233 F.3d at 1246.

Finally, summary judgment is not a "disfavored procedural shortcut"; on the contrary, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed.R.Civ.P. 1). In responding to a motion for summary judgment, "a party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

ANALYSIS

The court faces six primary issues: (1) whether Abilene Retail has standing to challenge the Ordinance; (2) whether the Ordinance is content-based or content-neutral and what level of constitutional scrutiny the court should apply; (3) upon deciding that the ordinance is content-neutral, whether the Ordinance advances a substantial government interest while being narrowly tailored and leaving open alternative avenues of communication; (4) whether the Ordinance violated the overbreadth doctrine; (5) whether the inspection provisions of the Ordinance violate the Fourth Amendment; and (6) whether the Ordinance violates the Fourteenth Amendment right to privacy.

After examining each of these issues, the court finds there is no genuine issue of material fact and that as a matter of law the Ordinance is valid as a content-neutral zoning regulation that seeks to prevent the secondary effects of sexually oriented businesses in Dickinson County.

1. Standing.

Before reaching the merits, this court must confirm that Abilene Retail has standing. *Essence, Inc. v. City of Federal Heights*, 285, F.3d 1272, 1280 (10th Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). A federal district court may only adjudicate an Article III case or controversy. *Id.* (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Article III standing has three independent requirements:

> First, the plaintiff must suffer an injury-in-fact. An injury in fact is an "invasion of a legally protected interest" that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical. Second, the injury must be "fairly trace[able] to the challenged action of the defendant," rather than some third party not before the court. Third, it must be likely that a favorable court decision will redress the injury of the plaintiff.

Id. (internal citations omitted).

In this case, the County alleges that Abilene Retail lacks standing because of the third factor: redressability. It asserts that there is no First Amendment protection for sexual devices. Based on this premise, it contends that First Amendment analysis of the Ordinance is unnecessary because Abilene Retail still would be regulated as a sexual device seller, regardless of any favorable First Amendment holding. *See Nova Health Systems v. Gandy,* 416 F.3d 1149, 1159 (10th Cir. 2005) (recognizing that a plaintiff lacks standing if a favorable decision will not redress the plaintiff's injury).

Abilene Retail responds with three reasons why it has standing but the court will focus on its third reason. It claims that it could restructure its inventory by not selling sexual devices and selling only materials and items protected by the First Amendment. In support, it analogizes to *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Admittedly in that case the issue was mootness and not redressability, but

the analogy remains convincing. There the Supreme Court allowed a nude dancing establishment to challenge a nude dancing ordinance even though the establishment had closed its doors and sold its property. The Court reached the merits after concluding that the establishment remained an incorporated entity under state law and "*could* very easily get back into the nude dancing business." *Id.* at 303. Likewise, given a favorable decision on the First Amendment issue of this case, Abilene Retail could very easily reopen its store without selling sexual devices. Although disputed, Abilene Retail's claim of standing is tenable in light of the Supreme Court's analysis in *City of Erie*. The court will therefore reach the merits of this case.

2. Whether the Ordinance is Content-based or Content-neutral

As a threshold matter, the court must decide whether the Ordinance is content-based or content-neutral. This determines whether the court applies strict scrutiny or intermediate scrutiny to the Ordinance. This issue has been heavily litigated, and the Tenth Circuit has concluded that zoning regulations similar to the Ordinance are content-neutral. Thus, the court will apply intermediate scrutiny in its First Amendment analysis.

In deciding whether the Ordinance is content-based or content-neutral, "the government's purpose in enacting the regulation is the controlling consideration." *City of Aurora*, 136 F.3d at 686. If the Ordinance "serves purposes unrelated to the content of expression" it is considered content-neutral "even if it has an incidental effect on some speakers or messages

but not others." *See id.* (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)). *City of Aurora* held that a zoning ordinance regulating sexually oriented businesses is generally content-neutral so long as the ordinance is "intended to curb the secondary effects" rather than First Amendment expression. *Id.*

Drawing from the actions taken by the city commission *City of Aurora*, the preamble of the Ordinance establishes that Dickinson County relied upon 22 secondary effects reports and 27 court cases affirming the secondary effects of sexually oriented businesses, including *City of Aurora* itself. Moreover, allegations of a hidden motive by the County against Abilene Retail are irrelevant. *City of Aurora*, 136 F.3d at 686-87. Accordingly, the court accepts the County's statement in its preamble that the secondary effects of sexually oriented businesses prompted the Ordinance. Intermediate scrutiny is thus the proper standard. *See also City of Littleton*, 311 F.3d at 1238 n.15 (10th Cir. 2002), rev'd on other grounds, *City of Littleton*, 541 U.S. 774 (applying intermediate scrutiny).

In addition, the Ordinance appears to be indistinguishable from the ordinance in *City of Aurora*. In that case, the city's ordinance targeted "off-site" sexually oriented retail stores with "comprehensive licensing, operating, and inspection requirements for sexually oriented businesses located within the city limits. The ordinance further required sexually oriented businesses to locate in industrially-zoned areas, and prohibited them from locating 1500 feet of churches, schools, residential districts or dwellings, public parks, and other sexually oriented businesses." 136 F.3d at 685. Because Abilene Retail could not distinguish the Ordinance in this case from the

ordinance in *City of Aurora* in any meaningful regard, the court relies on the on-point holding in *City of Aurora* throughout this decision.

3. Whether the Ordinance Survives Intermediate Scrutiny

As the Supreme Court announced in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a "content-neutral time, place, and manner" regulation is acceptable so long as it: (1) serves a substantial governmental interest; (2) is narrowly tailored; and (3) does not unreasonably limit alternative avenues of communication. *Id.* at 47. *City of Aurora*, 136 F.3d at 688. Abilene Retail challenges the Ordinance under each of the three requirements of the *City of Renton* test. The court will now address each challenge.

A. Substantial Government Interest

The Ordinance advances a substantial government interest if the County fulfills its burden of proof to "'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.' On the other hand, the [Supreme] Court has repeatedly emphasized that 'municipalities must be given a reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) (internal citations omitted).

Here, in the preamble to the Ordinance, the County includes 22 secondary effects reports and 27 cases discussing the secondary effects of sexually oriented businesses. Abilene Retail alleges that the

County's reliance on these outside materials was merely a pretext, a sham to cloak its true intent to suppress the protected First Amendment rights of Abilene Retail.

But this argument fails as a matter of law. To begin, "'[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses.' Accordingly it is common in these cases for cities to cite and rely on seemingly pre-packaged studies, as well as the findings of courts in other cases." *Id.* (quoting *City of Renton*, 475 U.S. at 51-52). The proper standard for reviewing the evidence and the burdens of the parties is currently as follows:

> This is not to say that the municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record

> with evidence renewing support for a theory that justifies its ordinance.

Id. at 1199.

In this case, there is ample evidence that the County "reasonably believed" that the reports and cases discussed in its preamble were "relevant to the problem" addressed by the Ordinance. *City of Renton*, 475 U.S. at 51-52. The County did not simply cite previous secondary effects studies and flatly ignore the challenges proposed by Abilene Retails' expert, Dr. Linz.[3] Instead, the County retained the author of one of the recognized secondary effects studies, Dr. McCleary, who directly reviewed and contradicted the findings of Abilene Retail's expert, Dr. Linz.

Rather than freshly evaluating the evidence of secondary effects, the Tenth Circuit, in line with the Supreme Court's repeated holdings, has "refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech." *Id.* (citation omitted). Instead, "cities are entitled to rely in part, on 'appeal to common sense,' rather than 'empirical data,' at least where there is no 'actual and convincing evidence from plaintiffs to the contrary.'" *Id.* This court may not reweigh the legislative findings of local policymakers. *See id.* (observing that "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners.")

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[3]The distinction alone negates Abilene Retail's reliance on *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003). In that case, the court qualified its holding: "Significantly, the County has not attempted to counter the Adult Lounges' evidence with local studies of its own. We are not dealing, therefore, with a case involving a battle of competing experts." *Id.* at 1272.

(citation omitted). Repeatedly, the federal courts have viewed Dr. Linz's methodological attacks as immaterial. In *City of Erie,* for instance, the Court urged that it already had "flatly rejected that idea." *Id.* at 302. It reiterated that "invocation of academic studies said to indicate that the threatened harms are not real in insufficient to cast doubt on the experience of the local government." *Id.*

Although Dr. Linz might raise new arguments, he does not dispute all aspects of the County's reliance. Numerous federal courts have examined this challenge, and routinely they have refused to critique in hindsight the internal decision-making process of local governments, particularly when the local governments make findings of legislative facts and review studies and cases in the field of secondary effects. Abilene Retail thus fails to trigger the burden shifting process discussed above. *See G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) (not shifting the burden to the city to establish secondary effects because Dr. Linz's reports were "not sufficient to vitiate the result reached in the Board's legislative process"). Moreover, in this case, not only did the County rely on 22 reports and 27 prior cases, but its expert also directly refuted the findings of Dr. Linz. Thus, even if Abilene Retail shifted the burden to the County, the County responded with adequate evidence to support the Ordinance. This meets the required showing to establish secondary effects under *City of Renton* and its progeny:

> To the extent [plaintiff] argues that the city has not "demonstrate[d] that the recited harms are real, not merely conjectural," we disagree. [The city] need not wait for sexually oriented businesses

> to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses. It may rely on the experience of other cities to determine whether the harms presented by sexually oriented businesses are real and should be regulated. In other words, the city may control a perceived risk through regulation. The Court has long held, and we agree, that [the city's] stated governmental interests in circumscribing the adverse secondary effects of sexually oriented businesses "must be accorded high respect."

City of Aurora, 136 F.3d at 688 (internal citations omitted).

Abilene Retail also challenges the Ordinance under the substantial interest prong by asserting that the Council singled it out for regulation and had a hostile motive. Again, this argument fails. *See, e.g., City of Erie*, 529 U.S. at 279 (noting that in line with a string of earlier cases, "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."); *City of Renton*, 475 U.S. at 49 (same).

The County therefore fulfills the first prong of the *City of Renton* test by proving that the Ordinance advances a substantial government interest.

B. Narrowly Tailored

The second prong of the *City of Renton* test requires that the Ordinance be narrowly tailored. Abilene Retail challenges that the Ordinance fails

under this prong because the Ordinance restricts the hours of operation between midnight and 6 A.M., the Ordinance includes within its scope retail-only stores, and the disclosure requirements for ownership are too demanding. Each of these challenges fails as a matter of law.

The objection against closing between midnight and 6 A.M. is invalid. If the Ordinance is included within the category of a "time, manner, and place regulations" as defined by *City of Renton*, then by definition some time restriction is allowed. Abilene Retail cannot identify any reason why the limit from midnight and 6 A.M. will have more than a *de minims* effect on its First Amendment rights. *Accord Doctor John's, Inc. v. City of Roy*, 333 F. Supp. 2d 1168, 1184 (D. Utah 2004). Further, the Tenth Circuit already has dismissed the second objection, involving a distinction between "on-site" and "off-site" retail stores, as "constitutionally irrelevant." *Id.* at 688. The final objection regarding ownership interest disclosure for those with a 35% or higher interest is also unfounded. *Cf. American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1248 (10th Cir. 2002) ("The Supreme Court has indicated that registration and disclosure provisions do not raise First Amendment problems.")

In *City of Aurora*, the Tenth Circuit reversed the district court because it "construed the narrow tailoring inquiry too narrowly, and held [the city] to a far more stringent standard than required by *Renton*... 136 F.3d at 689. The Tenth Circuit commanded that narrowly tailored "need not be the least restrictive or least intrusive means of doing so." *Id.* Because the Ordinance here is not "substantially broader than necessary," it is narrowly tailored. *Id.*

C. Alternative Avenues of Communication

In assessing the final prong under *City of Renton*, the court examines whether Abilene Retail can relocate The Lion's Den to other areas of Dickinson County. The First Amendment merely requires that the County "refrain from effectively denying [Abilene Retail] a reasonable opportunity to open and operate" within Dickinson County. *See City of Renton*, 475 U.S. at 932. The County bears the burden to make this showing. *City of Aurora*, 136 F.3d at 688. As a zoning provision, the Ordinance is valid "so long as 'reasonable alternative avenues of communication' are left open, a question that is answered through an analysis of how much land is available in which adult businesses may be located under the zoning system. In undertaking that analysis, the courts must examine what land is actually available, but also must keep in mind that adult businesses must 'fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees.'" *City of Littleton*, 311 F.3d at 1239, rev'd on other grounds, *City of Littleton*, 541 U.S. 774.

Upon review, the Ordinance survives. As it stands, the County designated ten available sites for sexually oriented businesses, and no other businesses currently are in Dickinson County. This clearly meets the final prong of the *City of Renton* test. *See City of Littleton*, 311 F.3d at 1240-41 (observing that designating seven available sites is sufficient if only one adult business exists in a city). In the end, the County has not used "the power to zone as a pretext for suppressing expression, but rather has sought to make some areas available for [sexually oriented stores] and their patrons, while at the same time preserving the

quality of life in the community at large by preventing those [stores] from locating in other areas. This, after all, is the essence of zoning. " *Id.*

4. Whether the Ordinance is Overbroad

A party challenging an ordinance as overbroad has the burden "to demonstrate a realistic danger that the [regulation] will significantly compromise recognized First Amendment protections of individuals not before the Court." *City Council of Los Angeles v. Vincent*, 466 U.S. 789, 802 (1984). In describing the danger posed by the overbreadth doctrine, the Tenth Circuit cautioned:

> Facial challenges are strong medicine. Article III of the Constitution ensures that federal courts are not "roving commissions assigned to pass judgment on the validity of the nation's laws," but instead address only specific "cases" and "controversies." As the Supreme Court recently observed, "facial challenges are best when infrequent...Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks." Because facial challenges push the judiciary towards the edge of its traditional purview and expertise, courts must be vigilant in applying a most exacting analysis to such claims.

Ward v. Utah, 398 F.3d 1239, 1246-47 (10th Cir. 2005) (internal citations omitted).

Because of these potential harms, "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law-particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. At that point, there are 'substantial social costs *created* by the overbreadth doctrine....'" *Faustin v. City and County of Denver*, 423 F.3d 1192, 1199-1200 (10th Cir. 2005) (citations omitted). Thus, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Hill v. Colorado*, 530 U.S. 703, 731-32 (2000). Given these daunting standards, Abilene Retail's overbreadth challenge is baseless. It merely offers hypothetical speculation. The Ordinance's scienter provision, which Abilene Retail never even addresses, further limits any overbreadth or vagueness of the Ordinance. *See Ward*, 398 F.3d at 1252. Because its conjectures are neither "real" nor "substantial" as articulated by the Tenth Circuit, its overbreadth challenge fails.

5. Whether the Inspection Provisions Violate the Fourth Amendment

Abilene Retail also alleges that the inspection provisions of the Ordinance violate the Fourth Amendment. That argument fails, however, because the inspections do not amount to a "search" within the Fourth Amendment. Initially, the court notes that "'the Fourth Amendment protects people, *not places*.'" *United States v. Longoria*, 177 F.3d 1179, 1183 (10th

Cir. 1999) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). In addition, "[w]hat a person knowingly exposes to the public, 'even in his own house or office, is not a subject of Fourth Amendment protection.'" *United States v. Flowers*, 336 F.3d 1222, 1228 (10th Cir. 2003) (quoting *Katz*, 389 U.S. at 351). Also, there is a substantially reduced expectation of privacy in a commercial building open to the public. *United States v. Anderson*, 154 F.3d 1225, 1229 (10th Cir. 1998).

This general rule applies particularly to open places in sexually oriented businesses. *See Maryland v. Macon*, 472 U.S. 463, 469 (1985) ("The officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment."). Because Abilene Retail has no reasonable expectation of privacy in the areas of its store open to the public, no "search" ever occurs based on the inspection provisions of the Ordinance. Thus, there is no Fourth Amendment violation.

6. Whether the Ordinance Violated the 14th Amendment Right to Privacy

As a final matter, Abilene Retail alleges that the Ordinance violates the Fourteenth Amendment substantive due process right to privacy. This argument lacks support. To begin, the Supreme Court already rejected a similar argument under the Fourteenth Amendment. *Cf. City of Renton*, 475 U.S. at 55 n. 4 ("As should be apparent from our proceeding discussion, respondents can fare no better under the

Equal Protection Clause than under the First Amendment itself.").

In addition, Abilene Retail heavily relies upon *Carey v. Population Services Int'l*, 431 U.S. 678 (1977). The facts and holding of that case are too attenuated to support its Fourteenth Amendment claim here. In *Carey*, the Supreme Court prevented states from restricting access to contraceptives. In this case, the privacy interest at stake is much less, and the regulation is merely a zoning regulation, not an outright restriction. The Ordinance forces sexual device stores to close between midnight and 6 A.M., but the Ordinance specifically exempts pharmacies and drug stores. Either may sell sexual devices at any hour of the day. Abilene Retails' cited authorities simply do not support its claim that a minor restriction from midnight to 6 A.M. on licensed sexual device stores violates the Fourteenth Amendment. The court finds no privacy violation.

6. Conclusion

For all the above reasons, the County has refute all of Abilene Retail's challenges to the Ordinance. The Ordinance is a valid, content-neutral zoning regulation as outlined by the Tenth Circuit in *City of Aurora*, 136 F.3d 683.

IT IS THEREFORE ORDERED BY THE COURT that the defendants' motion for summary judgment (doc. #48) is granted.

IT IS SO ORDERED this 1st day of December, 2005.

s/John W. Lungstrum
John W. Lungstrum
United States District Judge

ORDINANCE NO. 121304A

AN ORDINANCE REPEALING ORDINANCE NO. 070804 AND ESTABLISHING LICENSING REQUIREMENTS AND REGULATIONS FOR SEXUALLY ORIENTED BUSINESSES WITHIN DICKINSON COUNTY.

Section

- Preamble
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21. Location of Sexually Oriented Businesses.
22. Severability.
23. Conflicting Code Provisions Repealed.
24. Effective Date.

WHEREAS, sexually oriented businesses require special supervision from the public safety agencies of the County in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the County; and

WHEREAS, the Board of Commissioners finds that sexually oriented businesses, as a category of establishments, are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, as a category of establishments, have deleterious secondary effects and are often associated with crime and the downgrading of property values; and

WHEREAS, the Board of Commissioners desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, the County recognizes its constitutional duty to interpret, construe, and amend its laws and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, with the passage of any ordinance, the County and Board of Commissioners accept as binding the applicability of general principles of criminal and civil law and procedure and the rights and obligations under the United States and Kansas

Constitutions, Kansas Code, and the Kansas Rules of Civil Procedure and Criminal Procedure; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the U.S. Constitution or the Kansas Constitution, but to enact an ordinance to further the content-neutral governmental interests of the County, to wit, the controlling of secondary effects of sexually oriented businesses.

NOW, THEREFORE, BE IT RESOLVED AND ORDAINED by the Board of County Commissioners of Dickinson County, Kansas, sitting in regular session on the 13th day of December, 2004, and intending to exercise its power of home rule legislation pursuant to K.S.A. 19-101 a, K.S.A. 12-741, K.S.A. 12-770 that the following ordinance be enacted:

Section 1. Rationale and findings.

(a) Rationale. It is the purpose of this ordinance to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors or exhibitors of sexually oriented entertainment to their intended

market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material.

(b) Findings. Based on evidence of the adverse secondary effects of adult uses presented in hearings and in reports made available to the Council, and on findings, interpretations, and narrowing constructions incorporated in the cases of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 124 S.Ct. 2219 (June 7, 2004); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 426 U.S. 50 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *California v. LaRue*, 409 U.S. 109 (1972); *Heideman v. South Salt Lake City*, 342 F.3d 1182 (10th Cir. 2003); *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002); *O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990); *Z.J. Gifts D-2, L.L. C. v. City of Aurora*, 136 F. 3d 683 (10th Cir. 1998) (including exhibits cited therein); *Dodger's Bar & Grill, Inc. v. Johnson County*, 98 F.3d 1262 (10th Cir. 1996); *Connection Distrib. Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998); *Sundance Assocs. v. Reno*, 139 F.3d 804 (10th Cir. 1998); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004) (including exhibits cited therein); *Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977), *dismissed for want of a substantial federal question*, 435 U.S. 982 (1978); *Williams v. A.G. of Alabama*, 378 F.3d 1232 (11th Cir.

2004); *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County*, 256 F.Supp. 2d 385 (D. Md. 2003); *Dodger's Bar & Grill, Inc. v. Johnson County*, 32 F.3d 1436 (10th Cir. 1994); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241; *MS News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983); *Cortese v. Black*, No. 95-1429, 1996 U.S. App. LEXIS 15311 (10th Cir., June 25, 1996); *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002); *Ctr. for Fair Public Policy*, 336 F.3d 1153 (9th Cir. 2003) (and cases cited therein); and based upon reports concerning secondary effects occurring in and around sexually oriented businesses, including but not limited to, Austin, Texas - 1986; Indianapolis, Indiana - 1984; Garden Grove, California - 1991; Houston, Texas - 1983, 1997; Phoenix, Arizona - 1979, 1995-98; Chattanooga, Tennessee - 1999-2003; Minneapolis, Minnesota - 1980; Los Angeles, California - 1977; Whittier, California - 1978; Spokane, Washington - 2001; St. Cloud, Minnesota - 1994; Littleton, Colorado - 2004; Oklahoma City, Oklahoma - 1986; Dallas, Texas - 1997; Greensboro, North Carolina - 2003; Amarillo, Texas - 1977; Roncek, McCleary Expert Reports - 2004; New York, New York Times Square - 1994; and the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), the Board of Commission finds:

(1) Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution potential spread of disease, lewdness, public indecency, obscenity illicit drug use and drug

trafficking, negative impacts on property values, urban blight, litter, and sexual assault and exploitation.

(2) Sexual acts, including masturbation, oral and anal sex, sometimes occur inside the premises of or in the parking lot of unregulated sexually oriented businesses, including but not limited to those which provide private or semi-private booths, rooms, or cubicles for viewing films, videos, or live sexually explicit shows, which acts pose a risk to public health through the spread of sexually transmitted diseases.

(3) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.

(4) Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating, and said substantial interest exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses.

Section 2. Definitions.

For purposes of this chapter, the words and phrases in the sections hereunder shall have the meanings therein respectively ascribed to them unless a different meaning is clearly indicated by the context.

"Administrator" means the Dickinson County Zoning Administrator.

"Adult Arcade" means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are regularly maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are characterized by their emphasis upon matter exhibiting "specified sexual activities" or specified "anatomical areas."

"Adult Bookstore or Adult Video Store" means a commercial establishment which, as one of its principal purposes, offers for sale or rental for any form of consideration any one or more of the following: books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, digital video discs, slides or other visual representations which are characterized by their emphasis upon the display or "specified sexual activities" or "specified anatomical areas."

A "principal purpose" means that the commercial establishment:

(a) has a substantial portion of its displayed merchandise which consists of said items, or

(b) has a substantial portion of the wholesale value of its displayed merchandise which consists of said items, or

(c) has substantial portion of the retail value of its displayed merchandise which consists of said items, or

(d) derives a substantial portion of its revenues from the sale or rental, for any form of consideration of said items, or

(e) maintains a substantial section of its interior business space for the sale or rental of said items.

"Adult Cabaret" means a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, which regularly features persons who appear semi-nude.

"Adult Motel" means a motel, hotel, or similar commercial establishment which:

(a) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, other photographic reproductions, or live performances which are characterized by the display of "specified sexual activities" or "specified anatomical areas"; and which advertises the availability of such material by means of a sign visible from the public right-of-way, or by means of any on or off-premises advertising, including but not limited to, newspapers, magazines, pamphlets or leaflets, radio or television; or

(b) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(c) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

"Adult Motion Picture Theater" means a commercial establishment where films, motion pictures, videocassettes, slides, or similar photographic

reproductions which are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas" are regularly shown to more than five persons for any form of consideration.

"Board" means the Board of Commissioners of Dickinson County, Kansas.

"Characterized" means to describe the essential character or quality of an item. As applied in this ordinance, no business shall be classified as a sexually oriented business by virtue of showing, selling, or renting materials rated NC-17 or R by the Motion Picture Association of America.

"County" means Dickinson County, Kansas.

"Employ, Employee, and Employment" describe and pertain to any person who performs any service on the premises of a sexually oriented business, on a full time, part time, or contract basis, whether or not the person is denominated as an employee, independent contractor, agent or otherwise. Employee does not include a person exclusively on the premises for repair or maintenance of the premises or for the delivery of goods to the premises.

"Establish or Establishment" shall mean and include any of the following:

(a) The opening or commencement of any sexually oriented business as a new business;

(b) The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business; or

(c) The addition of any sexually oriented business to any other existing sexually oriented business.

"Hearing Body" shall means the Board of Commissioners of Dickinson County.

"Influential Interest" means any of the following: (1) the actual power, directly or indirectly, to control the operation, management or policies of a business or entity, (2) ownership of a financial interest of thirty percent (30%) or more of a business or of any class of voting securities of a business, or (3) holding an office (e..g., president, vice president, secretary, treasurer, etc.) or directorship in a legal entity which operates the sexually oriented business.

"Licensed Day-Care Center" means a facility licensed by the State of Kansas, whether situated within the County or not, that provides care, training, education, custody, treatment or supervision for more than twelve (12) children under fourteen (14) years of age, where such children are not related by blood, marriage or adoption to the owner or operator of the facility, for less than twenty-four (24) hours a day, regardless of whether or not the facility is operated for a profit or charges for the services it offers.

"Licensee" shall mean a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual or individuals listed as an applicant on the application for a sexually oriented business license. In case of an "employee," it shall mean the person in whose name the sexually oriented business employee license has been issued.

"Nudity or a State of Nudity" means the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.

"Operate or Cause to Operate" shall mean to cause to function or to put or keep in a state of doing business. "Operator" means any person on the premises of a sexually oriented business who causes the business to function or who puts or keeps in operation the business or who is authorized to manage the business or exercise overall operational control of the business premises. A person may be found to be operating or causing to be operated a sexually oriented business whether or not that person is an owner, part owner, or licensee of the business.

"Person" shall mean individual, proprietorship, partnership, corporation, association, or other legal entity.

"Premises" means the real property upon which the sexually oriented business is located, and all appurtenances thereto and buildings thereon, including, but not limited to, the sexually oriented business, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control, or supervision of the licensee, as described in the application for a business license pursuant to Section IV of this ordinance.

"Regularly" means and refers to the consistent and repeated doing of the act so described.

"Semi-Nude or State of Semi-Nudity" means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a dress, blouse, shirt leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

"Semi-Nude Model Studio" means a place where persons regularly appear in a state of semi-nudity for money or any form of consideration in order to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons.

This definition does not apply to any place where persons appearing in a state of semi-nudity did so in a modeling class operated:

(a) By a college, junior college, or university supported entirely or partly by taxation;

(b) By a private college or university which maintains and operates educational programs in which credited are transferable to college, junior college, or university supported entirely or partly by taxation; or

(c) In a structure:

(1) Which has no sign visible from the exterior of the structure and no other advertising that indicates a semi-nude person is available for viewing; and

(2) Where, in order to participate in a class a student must enroll at least three days in advance of the class.

"Sexual Device" means any three (3) dimensional object designed and marketed for stimulation of the male or female human genital organ or anus or for sadomasochistic use or abuse of oneself or others and shall include devices such as dildos, vibrators, penis pumps, butt plugs, and physical representations of the human genital organs. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

"Sexual Device Shop" means a commercial establishment that regularly features sexual devices. Nothing in this definition shall be construed to include any pharmacy, drug store, medical clinic, or any establishment primarily dedicated to providing medical or healthcare products or services, nor shall this definition be construed to include commercial establishments which do not restrict access to any portion of their premises by reason of age.

"Sexual Encounter Center" shall mean a business or commercial enterprise that, as one of its principal business purposes, purports to offer for any form of consideration, physical contact in the form of wrestling or tumbling between persons of the opposite sex when one or more of the persons is semi-nude.

"Sexual Oriented Business" means an "adult bookstore or adult video store," an "adult cabaret," an "adult motel," an "adult motion picture theater," a "semi-nude model studio," or a "sexual encounter center."

"Specified Anatomical Areas" means and includes:

(a) Less than completely and opaquely

covered: human genitals, pubic region; buttock; and female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

"Specified Criminal Activity" means:

(a) any of the following specified crimes for which less than five years elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date:

(1) any sex offense set forth in Chapter 21, Article 35, of the Kansas Statutes Annotated, or amendments thereto;

(2) any crime set forth in Kansas Uniform Controlled Substances Act, Chapter 65, Article 41, of the Kansas Statutes Annotated, or amendments thereto;

(3) incest (K.S.A. 21-3602, or amendments thereto);

(4) aggravated incest (K.S.A. 21-3603, or amendments thereto);

(5) furnishing alcoholic liquor or cereal malt beverage to a minor (K.S.A. 21-3610, or amendments thereto);

(6) furnishing alcoholic beverages to a minor for illicit purposes (K.S.A. 21-3610b, or amendments thereto);

(7) promoting obscenity (K.S.A. 21-4301);

(8) promoting obscenity to minors (K.S.A. 21-4301a);

(9) promotion to minors of obscenity harmful to minors (K.S.A. 21-4301c); and

(b) any offenses in other jurisdictions that, had the predicate act(s) been committed in Kansas, would constitute any of the foregoing offenses.

"Specified Sexual Activity" means any of the following:

(a) intercourse, oral copulation, masturbation or sodomy; or

(b) excretory functions as part of or in connection with any of the activities described in (a) above.

"Substantial" means at least thirty -five percent (35%) of the item(s) so modified.

"Transfer of Ownership or Control" of sexually oriented business shall mean any of the following:

(a) The sale, lease, or sublease of the business;

(b) The transfer of securities which constitute an influential interest in the business, whether by sale, exchange, or similar means; or

(c) The establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

"Viewing Room" shall mean the room, booth, or area where a patron of sexually oriented business would ordinarily be positioned while watching a film, videocassette, or other video reproduction.

Section 3. Classification.

The classifications for sexually oriented businesses shall be as follows:

(a) Adult bookstores or adult video stores;
(b) Adult cabarets;
(c) Adult motels;
(d) Adult motion picture theaters;
(e) Semi-nude model studios;
(f) Sexual device shops;
(g) Sexual encounter centers.

Section 4. License required.

(a) It shall be unlawful for any person to operate a sexually oriented business in Dickinson County without a valid sexually oriented business license.
(b) It shall be unlawful for any person to be an "employee," as defined in this Chapter, of a sexually oriented business in Dickinson County without a valid sexually oriented business employee license.
(c) An applicant for a sexually oriented business license or a sexually oriented business employee license shall file in person at the office of Dickinson County Zoning Department ("Zoning Department") a completed application made on a form provided by the Zoning Department. The application shall be signed as required by subsection (e) herein and shall be notarized. An application shall be considered complete when it contains, for each person required to sign the application, the information and/or items required in Paragraphs 1 through 7 below, accompanied by the appropriate fee identified in Section 6.

(1) The applicant's full true name and any other names used by the applicants in the preceding five (5) years.

(2) Current business address or another mailing address of the applicant.

(3) Written proof of age, in the form of a driver's license or copy of a birth certificate accompanied by a picture identification document issued by a governmental agency.

(4) If the application is for a sexually oriented business license, the business name, location, legal description, mailing address and phone number of the sexually oriented business.

(5) If the application is for a sexually oriented business license, the name and business address of the statutory agent or other agent authorized to receive service of process.

(6) A statement of whether an applicant has been convicted of or has pled guilty or nolo contendere to specified criminal activity as defined in this ordinance, and if so, each specified criminal activity involved, including the date, place, and jurisdiction of each as well as the dates of conviction and release from confinement, where applicable.

(7) A statement of whether any sexually oriented business in which an applicant has had an influential interest, has, in the previous five (5) years (and at a time during which the applicant had the influential interest):

(i) been declared by a court of law to be a nuisance; or

(ii) been subject to a court order of closure or padlocking.

The information provided pursuant to Paragraphs 1 through 7 of this subsection shall be supplemented in writing by certified mail, return receipt requested, to the Zoning Department within ten (10) working days of a change of circumstances which would render the information originally submitted false or incomplete.

(d) An application for a sexually oriented business license shall be accompanied by a legal description of the property where the business is located and a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but shall be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six (6) inches. Applicants who are required to comply with Sections 14 and 18 of this chapter shall submit a diagram indicating that the interior configuration meets the requirements of those sections.

(e) If a person who wishes to operate a sexually oriented business is an individual, he shall sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each person with an influential interest in the business shall sign the application for a license as applicant. "Applicant" shall also include the legal entity seeking a license. Each applicant must be qualified under Section 5 and each applicant shall be considered a licensee if a license is granted.

(f) The information provided by an applicant in connection with an application for a license under this chapter shall be maintained by the Zoning Department on a confidential basis, and such information may be

disclosed only as may be required, and only to the extent required, by court order.

Section 5. Issuance of license.

(a) Upon the filing of a completed application under Section 4(c) for a sexually oriented business license, the Dickinson County Zoning Administrator (hereinafter, "Administrator") shall immediately issue a Temporary License to the applicant, which Temporary License shall expire upon the final decision of the County to deny or grant an annual license. Within twenty (20) days of the filing date of a completed sexually oriented business license application, the Administrator shall issue a license to the applicant or issue to the applicant a letter of intent to deny the application. The Administrator shall issue a license unless:

(1) An applicant is less than eighteen (18) years of age.

(2) An applicant has failed to provide information as required by Section 4 for issuance of a license or has falsely answered a question or request for information on the application form.

(3) The license application fee required by this Chapter has not been paid.

(4) The sexually oriented business, as defined herein, is not in compliance with the interior configuration requirements of this ordinance or is not in compliance with locational requirements of this ordinance.

(5) Any sexual oriented business in which the applicant has had an influential interest, has, in the previous five (5) years (and at a time during which the applicant had the influential interest):

(i) been declared by a court of law to be a nuisance; or

(ii) been subject to an order of closure or padlocking.

(6) An applicant has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this ordinance. For purposes of this ordinance, an Alford plea shall be treated the same as a guilty plea.

(b) Upon the filing of a completed application under Section 4(c) for a sexually oriented business employee license, the Dickinson County Zoning Administrator (hereinafter, "Administrator") shall immediately issue a Temporary License to the applicant, which Temporary License shall expire upon the final decision of the County to deny or grant an annual license. Within twenty (20) days of the filing date of a completed sexually oriented business employee license application, the Administrator shall either issue a license or issue a written notice of intent to deny a license to the applicant. The Administrator shall approve the issuance of a license unless:

(1) The applicant is less than eighteen (18) year of age.

(2) The applicant has failed to provide information as required by Section 4 for issuance of a license or has falsely answered a question or request for information on the application form.

(3) The license application fee required by this Chapter has not been paid.

(4) Any sexually oriented business in which the applicant has had an influential interest, has, in the previous five (5) years (and at the time during which the applicant had the influential interest):

(i) been declared by a court of law to be a nuisance; or

(ii) been subject to an order of closure or padlocking.

(5) The applicant has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this ordinance.

(c) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the number of the license issued to the licensee(s), the expiration date, and, if the license is for a sexually oriented business, the address of the sexually oriented business. The sexually oriented business license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be read at any time. A sexually oriented business employee shall keep the employee's license on his or her person or on the premises where the licensee is then working or performing.

Section 6. Fees.

(a) The initial license and annual renewal fees for sexually oriented business licenses and sexually oriented business employee licenses shall be as follows: one hundred dollars ($100) for the initial fee for a sexually oriented business license and fifty dollars ($50) for annual renewal; fifty dollars ($50) for the initial sexually oriented business employee license and twenty-five dollars ($25) for annual renewal.

Section 7. Inspection.

(a) Sexually oriented businesses and sexually oriented business employees shall permit the Administrator and his or her agents to inspect, from time to time on an occasional basis, the portions of the sexually oriented business premises where patrons are permitted, for the purpose of ensuring compliance with the specific regulations of this Chapter, during those times when the sexually oriented business is occupied by patrons or is open to the public. This section shall be narrowly construed by the County to authorize reasonable inspections of the licensed premises pursuant to this chapter, but not to authorize a harassing or excessive pattern of inspections.

(b) The provisions of this Section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation.

Section 8. Expiration of license.

(a) Each license shall remain valid for a period of one calendar year from the date of issuance unless otherwise suspended or revoked. Such license may be renewed only by making application and payment of a fee as provided in Section 4 and Section 6.

(b) Application for renewal should be made pursuant to the procedures set forth in Section 4 at least ninety (90) days before the expiration date, and when made less than ninety (90) days before the expiration date, the expiration of the license will not be affected.

Section 9. Suspension.

(a) The County shall issue a written letter of intent to suspend a sexually oriented business license for a period not to exceed thirty (30) days if the sexually oriented business licensee has knowingly violated this chapter or has knowingly allowed an employee to violate this Chapter.

(b) The County shall issue a written letter of intent to suspend a sexually oriented business employee license if the employee has knowingly violated this chapter.

Section 10. Revocation.

(a) The County shall issue a letter of intent to revoke a sexually oriented business license or a sexually oriented business employee license, as applicable, if the licensee knowingly violates this chapter or has knowingly allowed an employee to violate this chapter and the licensee's license has been suspended within the previous twelve-month (12-mo.) period.

(b) The County shall issue written intent to revoke a sexually oriented business license or a sexually oriented business employee license, as applicable, if:

(1) The licensee has knowingly given false information in the application for the sexually oriented business license;

(2) The licensee has knowingly or recklessly engaged in or allowed possession, use, or sale of controlled substances on the premises;

(3) The licensee has knowingly or recklessly engaged in or allowed prostitution on the premises;

(4) The licensee has knowingly or recklessly operated the sexually oriented business during a period of time when the license was finally suspended or revoked; or

(5) The licensee has knowingly or recklessly engaged in or allowed any specified sexual activity to occur in or on the licensed premises.

(c) The fact that any relevant conviction is being appealed shall have no effect on the revocation of the license, provided that, if any conviction which serves as a basis of a license revocation is overturned or reversed on appeal, that conviction shall be treated as null and of no effect for revocation purposes.

(d) When, after the notice and hearing procedure described in Section 11, the Board of Commissioners revokes a license, the revocation shall continue for one (1) year and the licensee shall not be issued a sexually oriented business license or sexually oriented business employee license for one (1) year from the date revocation becomes effective.

Section 11. Hearing; denial, revocation, and suspension; appeal.

(a) When the Administrator issues a written notice of intent to deny, suspend, or revoke a license, the Administrator shall immediately send such notice, which shall include the specific grounds under this ordinance for such action, to the applicant or licensee (respondent) by personal delivery or certified mail. The notice shall be directed to the most current business address or other mailing address on file with the Administrator for the respondent. The notice shall specify a date, not less than ten (10) days nor more than twenty (20) days after the date the notice is

issued, on which the Board of Commissioners shall conduct a hearing on the Administrator's intent to deny, suspend, or revoke the license.

At the hearing, the respondent shall have the opportunity to present all of respondent's arguments and to be represented by counsel, present evidence and witnesses on his or her behalf, and cross-examine any of the Administrator's witnesses. The Administrator shall also be represented by counsel, and shall bear the burden of proving the grounds for denying, suspending, or revoking the license. The hearing shall take no longer than two (2) days, unless extended at the request of the respondent to meet the requirements of due process and proper administration of justice. The Board of Commissioners shall issue a written decision, including specific reasons for the decision pursuant to this ordinance, to the respondent within five (5) days after the hearing.

If the decision is to deny, suspend, or revoke the license, the decision shall not become effective until the twentieth day after it is rendered, and the decision shall include a statement advising the respondent of the right to appeal such decision to a court of competent jurisdiction. If the Board's decision finds that no grounds exist for denial, suspension, or revocation of the license, the Board shall, contemporaneously with the issuance of the decision, order the Administrator to immediately withdraw the intent to deny, suspend, or revoke the license and to notify the respondent in writing by certified mail or such action. If the respondent is not yet licensed, the Administrator shall contemporaneously therewith issue the license to the applicant.

(b) If any court action challenging the Board's decision is initiated, the Board shall prepare and transmit to the court a transcript of the hearing within ten (10) days after receiving written notice of the filing of the court action. The Board shall consent to expedited briefing and/or disposition of the action, shall comply with any expedited schedule set by the court, and shall facilitate prompt judicial review of the proceedings. The following shall apply to any sexually oriented business that is in operation as of the effective date of this ordinance: Upon the filing of any court action to appeal, challenge, restrain, or otherwise enjoin a license denial, suspension, or revocation, the County shall immediately issue the respondent a Provisional License. The Provisional License shall allow the respondent to continue operation of the sexually oriented business or to continue employment as a sexually oriented business employee and shall not expire until the court's entry of a judgment on the respondent's court action to appeal, challenge, restrain, or otherwise enjoin the license denial, suspension, or revocation.

Section 12. Transfer of license.

A licensee shall not transfer his or her license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the sexually oriented business license application.

Section 13. Hours of operation.

No sexually oriented business shall be or remain open for business between 12:00 midnight and 6:00 a.m. on any day.

Section 14. Regulations pertaining to exhibition of sexually explicit films or videos.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, video cassette, or other video reproduction characterized by an emphasis on the display of specified sexual activities or specified anatomical areas shall comply with the following requirements.

(1) Each application for a sexually oriented business license shall contain a diagram of the premises showing the location of all operator's stations, viewing rooms, overhead lighting fixtures, video cameras and monitors installed for monitoring purposes and restrooms, and shall designate all portions of the premises in which patrons will not be permitted. Restrooms shall not contain video reproduction equipment. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram shall be oriented to the north or to some designated street or object and shall be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of

the interior of the premises to an accuracy of plus or minus six inches. The Administrator may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) It shall be the duty of the operator, and of any employees present on the premises, to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Paragraph 1 of this subsection.

(3) The interior premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot candles as measured at the floor level. It shall be the duty of the operator, and of any employees present on the premises, to ensure that the illumination described above is maintained at all times that the premises is occupied by patrons or open for business.

(4) It shall be the duty of the operator, and of any employees present on the premises, to ensure that no sexual activity occurs in or on the licensed premises.

(5) It shall be the duty of the operator to post conspicuous signs in well-lighted entry areas of the business stating all of the following:

(i) That the occupancy of viewing rooms is limited to one person.

(ii) That sexual activity on the premises is prohibited.

(iii) That the making of openings between viewing rooms is prohibited.

(iv) That violators will be required to leave the premises.

(v) That violations of Subparagraphs (b), (c) and (d) of this paragraph are unlawful.

(6) It shall be the duty of the operator to enforce the regulations articulated in (5)(i) through (iv) above.

(7) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a operator's station of every area of the premises, including the interior of each viewing room but excluding restrooms, to which any patron is permitted access for any purpose. An operator's station shall not exceed thirty-two (32) square feet of floor area. If the premises has two (2) or more operator's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the operator's stations. The view required in this paragraph must be by direct line of sight from the operator's station. It is the duty of the operator to ensure that at least one employee is on duty and situated in each operator's station at all times that any patron is on the premises. It shall be the duty of the operator, and it shall also be the duty of any employees present on the premises, to ensure that the view area specified in this paragraph remains unobstructed by any doors, curtains, walls, merchandise, display racks or other materials or enclosures at all times that any patron is present on the premises.

(b) It shall be unlawful for a person having a duty under this section to knowingly fail to fulfill that duty.

Section 15. Loitering, exterior lighting, visibility, and monitoring requirements.

(a) It shall be the duty of the operator of a sexually oriented business to: (a) post conspicuous signs stating that no loitering is permitted on such property; (b) designate one or more employees to monitor the activities of persons on such property by visually inspecting such property at least once every ninety (90) minutes or inspecting such property by use of video cameras and monitors; and (c) provide lighting of the exterior premises to provide for visual inspection or video monitoring to prohibit loitering. If used, video cameras and monitors shall operate continuously at all times that the premises are open for business. The monitors shall be installed within an operator's station.

(b) It shall be unlawful for a person having a duty under this section to knowingly fail to fulfill that duty.

(c) No sexually oriented business shall erect a fence, wall, or other barrier that prevents any portion of the parking lot(s) for the establishment from being visible from a public right of way.

Section 16. Penalties and enforcement.

(a) A person who knowingly violates, disobeys, omits, neglects, or refuses to comply with or resists the enforcement of any of the provisions of this chapter shall be guilty of a Class B misdemeanor, and, upon conviction, shall be punishable by a fine not to exceed $1,000.00, or imprisonment in the County Jail for a period not to exceed six (6) months. Each day a violation is committed, or permitted to continue, shall constitute a separate offense and shall be fined as

such. Criminal prosecutions pursuant to this section shall be brought by the County Attorney.

(b) The County Counselor is hereby authorized to institute civil proceedings necessary for the enforcement of this ordinance to restrain or correct violations hereof. Such proceedings, including injunction, shall be brought in the name of the County, provided, however, that nothing in this section and no action taken hereunder, shall be held to exclude such criminal or administrative proceedings as may be authorized by other provisions of this ordinance or any of the laws or ordinances in force in the County, or to exempt anyone violating this code or any part of the said laws from any penalty which may be incurred.

Section 17. Applicability of ordinance to existing businesses.

All existing sexually oriented businesses and sexually oriented business employees are hereby granted a *De Facto* Temporary License to continue operation or employment for a period of ninety (90) days following the effective date of this ordinance. By the end of said ninety (90) days, all sexually oriented businesses and sexually oriented business employees must conform to and abide by the requirements of this chapter, provided that a sexually oriented business that is in a nonconforming location pursuant to Section 21 of this ordinance shall be allowed to continue in that location according to the terms and time frame stated in that Section.

Section 18. Prohibited activities.

It is unlawful for a sexually oriented business to knowingly violate the following regulations or to knowingly allow an employee or any other person to violate the following regulations.

(a) It shall be a violation of this ordinance for a patron, employee, or any other person to knowingly or intentionally, in a sexually oriented business, appear in a state of nudity, regardless of whether such public nudity is expressive in nature.

(b) It shall be a violation of this ordinance for a person to knowingly or intentionally, in a sexually oriented business, appear in a semi-nude condition unless the person is an employee who, while semi-nude, remains at least six (6) feet from any patron or customer and on a stage at least eighteen (18) inches from the floor in a room of at least one thousand (1,000) square feet.

(c) It shall be a violation of this ordinance for any employee who regularly appears semi-nude in a sexually oriented business to knowingly or intentionally touch a customer or the clothing of a customer on the premises of a sexually oriented business.

(d) It shall be a violation of this ordinance for any person to sell, use, or consume alcoholic beverages on the premises of a sexually oriented business.

A sign in a form to be presented by the Administrator or the Zoning Department and summarizing the provisions of Paragraph (a), (b), (c), and (d) of this Section, shall be posted near the entrance of the sexually oriented business in such a manner as to be clearly visible to patrons upon entry.

Section 19. Scienter required to prove violation or business licensee liability.

This ordinance does not impose strict liability. Unless a culpable mental state is otherwise specified herein, a showing of a knowing or reckless mental state is necessary to establish a violation of a provision of this ordinance. Notwithstanding anything to the contrary, for the purposes of this ordinance, an act by an employee that constitutes grounds for suspension or revocation of that employee's license shall be imputed to the sexually oriented business licensee for purposes of finding a violation of this ordinance, or for purposes of license denial, suspension, or revocation, only if an officer, director, or general partner, or a person who managed, supervised, or controlled the operation of the business premises, knowingly or recklessly allowed such act to occur on the premises. It shall be a defense to liability that the person to whom liability is imputed was powerless to prevent the act.

Section 20. Failure of County to meet deadline not to risk applicant/licensee rights.

In the event that a County official is required to take an act or do a thing pursuant to this ordinance within a prescribed time, and fails to take such act or do such thing within the time prescribed, said failure shall not prevent the exercise of constitutional rights of an applicant or licensee. If the act required of the County official under this ordinance, and not completed in the time prescribed, includes approval of condition(s) necessary for approval by the County of an applicant or licensee's application for sexually oriented business license or a sexually oriented business employee's

license (including a renewal), the license shall be deemed granted and the business or employee allowed to commence operations or employment the day after the deadline for the County's action has passed.

Section 21. Location of sexually oriented businesses.

(a) Sexually oriented businesses shall not be required to obtain a conditional use permit.

(b) A sexually oriented business shall be allowed to operate on any land in Dickinson County, provided that the structure occupied by the sexually oriented business is at least:

(1) 1200 feet from any structure occupied by another sexually oriented business or by a business licensed by the State of Kansas to sell alcohol at the premises; and

(2) 1200 feet from any structure occupied by a house of worship, licensed day-care center, public or private elementary or secondary school, or public part; and

(3) 1200 feet from any structure used as a residence.

(b) For the purpose of this section, measurements shall be made in a straight line in all directions without regard to intervening structures or objects, from the nearest portion of the structure occupied by the sexually oriented business to the nearest portion of the structure occupied by any of the land use(s) identified in the subsections (b)(1)-(b)(3) above.

(c) Notwithstanding anything to the contrary in Dickinson County Code, a nonconforming sexually oriented business, lawfully existing in all respects under law prior to the effective date of this ordinance,

may continue to operate for two (2) years following that date in order to make a reasonable recoupment of its investment at its current location. At the conclusion of said two (2) years, the use will no longer be recognized as a lawful nonconforming use, provided that a nonconforming sexually oriented business may apply for one or more six-month extensions of the original two-year period upon a showing of financial hardship. An application for an initial extension based upon financial hardship ("hardship exception") shall be made a least sixty (60) days before the conclusion of the aforementioned two-year (2-yr.) period. If a hardship extension is granted, subsequent applications for hardship extensions shall be made at least sixty (60) days before the conclusion of the non-conforming sexually oriented business's current extension period.
(d) Procedure for seeking hardship extension. An application for a hardship extension shall be filed in writing with the Zoning Department, and shall include evidence of purchase and improvement costs, income earned and lost, depreciation, and costs of relocation. Within ten (10) days after receiving the application, the Zoning Department shall schedule a public hearing on the application before the Zoning Commission, which public hearing shall be conducted withing thirty (30) days after the Zoning Department's receipt of the application. Notice of the time and place of such public hearing shall be published at least ten (10) days before the hearing in a newspaper of general circulation published within the County, and shall contain the particular location for which the hardship extension is requested.

The Zoning Commission shall issue a written decision within ten (10) days after the public hearing on the

application for a hardship extension. The hardship extension shall be granted upon a showing, pursuant to Generally Accepted Accounting Principles (GAAP), that the nonconforming sexually oriented business is unable to recoup its investments, made prior to the effective date of this ordinance, in the business's current location unless the hardship extension is granted.

Section 22. Severability.

This ordinance and each section and provision of said chapter hereunder, are hereby declared to be independent divisions and subdivisions and, not withstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of said chapter, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such sections and provisions to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid. Should any procedural aspect of this ordinance be invalidated, such invalidation shall not affect the enforceability of the substantive aspects of this ordinance.

Section 23. Conflicting code provisions repealed.

Ordinance No. 070804 is hereby repealed. Additionally, any provision(s) in the Dickinson County code of ordinances in conflict with any provision in this ordinance is hereby deemed inoperative and repealed.

Section 24. Effective date.

This ordinance shall become effective after publication in the official County newspaper and is passed this 13th day of December, 2004.

s/Leo L. Lefert
LEO LEFERT
Chairman

s/Bill Kohman
BILL KOHMAN
Commissioner

s/Paul Whitehair
PAUL WHITEHAIR
Commissioner

ATTEST:

s/Sandra Emig
SANDRA EMIG
Clerk

Dated this 13th day of December, 2004.

BOARD OF COUNTY COMMISSIONERS OF
DICKINSON COUNTY, KANSAS

84 2

No. 07-972

Supreme Court, U.S.
FILED
FEB 25 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOARD OF COMMISSIONERS OF
DICKINSON COUNTY, KANSAS, ET AL.,

Petitioners,

v.

ABILENE RETAIL #30, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does a party contesting, on First Amendment grounds, the validity of an adult use ordinance, create an issue of material fact, precluding summary judgment, on the question of whether the evidence ostensibly relied upon in support of the ordinance at issue is reasonably believed to be relevant to the amelioration of adverse secondary effects in the subject jurisdiction, by demonstrating that the materials relied upon do not support, and in some cases militate against, the adoption of the particular regulations at issue?

2. Does such a party cast direct doubt upon the legislative rationale ostensibly supporting such an ordinance, sufficient to create a question of material fact and preclude summary judgment as to the legitimacy of that rationale, by:

   a. Introducing expert testimony demonstrating that the evidence ostensibly relied upon by the county in legislating was shoddy, and did not support its legislative rationale, and;

   b. Introducing expert testimony tending to affirmatively disprove a connection between the operation of adult uses and such adverse secondary effects, and;

   c. Introducing local evidence showing the absence of any connection between the sole adult use in the subject jurisdiction and such adverse secondary effects?

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED – Continued

3. Does such a party create a material question of fact for trial, precluding summary judgment, as to whether the predominant concern of an adult use ordinance is with the content of adult speech, rather than its secondary effects, when:

   a. The immediate predecessor of the subject ordinance recited reliance on a legislative record that was neither assembled nor reviewed prior to its enactment;

   b. A last-minute amendment to the subject ordinance ensured that the only adult use in the jurisdiction would be compelled to close in its present location;

   c. The ordinance was adopted despite the awareness on the part of the legislature that no adverse secondary effects were caused by the only adult use in the county;

   d. The ordinance would force the closure of the only adult use in the county despite its being located in the sort of location that most such ordinances, and the studies relied upon by the county, suggest as best suited to ameliorate the alleged adverse secondary effects of adult speech?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Abilene Retail #30, Inc., hereby advises the Court that:

(1) It has no parent corporation, and;

(2) No publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

In September 2003, Respondent opened an adult bookstore in Dickinson County, Kansas. Located adjacent to an off ramp on Interstate 70, the bookstore was the first adult business to locate in that county in at least a quarter century, and perhaps the first ever. Pet. App. at 3a.

For ten months, that store operated subject to no more regulation than any other business in the county, before, on July 8, 2004, the county adopted an ordinance (No. 070804, "the first ordinance") restricting the location and operation of adult businesses. Pet. App. at 4a.[1]

The Respondent filed suit in district court on July 16, 2004, seeking declaratory, and preliminary and permanent injunctive relief against the enforcement of the ordinance on First, Fourth and Fourteenth Amendment grounds. Pet. App. 5a.

The parties agreed to the entry of a preliminary injunction, staying the enforcement of the first ordinance, pending the resolution of this case. Concerned that the first ordinance might not survive constitutional scrutiny, the county thereafter began to consider draft versions of a revised adult use ordinance, which was the subject of a public hearing on December 6, 2004. Pet. App. at 5a.

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[1] The content of, and the ostensible basis for that legislation are addressed later in this Brief.

That night, the county commissioners heard testimony that the location requirements set forth in the draft ordinance before them would not force the Respondent to close its store in Dickinson County. Pet. App. at 5a.

On December 13, 2004, the county adopted a revised adult use ordinance (No. 121304A, "the second ordinance"), the enforcement of which would force the Respondent to close its store, in its present location, after a period of amortization. Pet. App. at 5a-6a.

On February 11, 2005, the Respondent filed an amended complaint, contesting the second ordinance on substantially the same bases as the first, after which, the parties agreed to continue the existing preliminary injunction, allowing it to remain in force as the litigation progressed. Pet. App. at 8a.

On March 28, 2005, the Petitioners filed a motion for summary judgment, contending, inter alia, that the ordinance was a content neutral restriction intended to address the perceived secondary effects of adult expression, was narrowly tailored to do so, and left open adequate alternative avenues of communication, in accord with the requirements of the First Amendment. Pet. App. at 62a.

Discovery commenced, and over a four-month period, the Respondent deposed various employees of Dickinson County, a commissioner designated as the Civil Rule 30(b)(6) deponent for the county, and a member of the public actively involved in advocating for the closure of its store.

Both sides also engaged experts, who provided reports and were deposed regarding the claimed connection between adult uses and adverse secondary effects, and regarding whether the county reasonably relied upon the materials ostensibly in its legislative record in enacting the ordinance at issue. Pet. App. at 8a. "Ostensibly" is apt because Petitioners enacted the first ordinance without ever having consulted the documents to which its preamble referred, despite express preambulatory claims to the contrary. Pet. App. at 5a.[2]

On December 1, 2005, the district court entered summary judgment for the Petitioners on all counts.

On appeal, a Tenth Circuit panel held that the district court had erred. Both the panel majority, Pet. App. at 14a-15a, and a concurrence, Pet. App. at 30a, first concluded that the predominant legislative purpose behind the second ordinance was content-neutral,

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[2] Respondent also established that last minute changes to the second ordinance, that would force the Respondent to close its bookstore in its present location, were made between the December 6, 2004 public meeting and the December 13, 2004 adoption of the ordinance, only after a member of the public pointed out that an earlier draft would not force that result. Pet. App. 5a-6a. Respondent demonstrated below, through the testimony of the county's own witnesses, none of the adverse secondary effects supposedly attributable to adult uses manifested themselves in Dickinson County in the more than twenty months that elapsed between the opening of the bookstore and the close of discovery – during which neither the first nor second ordinance was enforced. Pet. App. at 42a and n.6. Respondent will discuss the significance of these facts later in this Brief.

an issue Respondent contested in the district court and on appeal, and that therefore strict scrutiny did not apply.

Applying intermediate scrutiny, however, the panel majority held that it was error to conclude, as a matter of law, that the legislative record ostensibly relied upon by the county reasonably supported the restrictions set forth in the second ordinance, and that material questions of fact precluded summary judgment for the Petitioners on that point. Pet. App. at 16a-25a.

In a concurrence – which the panel majority joined as an alternative basis for its holding, Pet. App. at 3a – Circuit Judge Ebel also found that summary judgment was improper, albeit for a different reason, concluding that while the county had met its initial burden, Respondent had succeeded in casting doubt upon its legislative rationale.

He found that it had done so both through the introduction of expert and other evidence tending to undermine the Petitioners' secondary effects theory, Pet. App. at 41a-43a, and by demonstrating flaws in the studies contained in the legislative record itself, thereby creating a material question of fact regarding the shoddiness of the legislative record. Pet. App. at 44a-46a.

On October 25, 2007, the Tenth Circuit denied a petition for rehearing en banc filed by the Petitioners. Pet. App. at 49a. The petition now at bar followed.

REASONS FOR DENYING THE WRIT

In this case the Tenth Circuit reached an altogether correct result through the thoughtful application of existing precedent. In finding that the extensive record below precluded summary judgment regarding the constitutionality of the second ordinance, both the majority and the concurrence carefully followed the analytical template set forth by the plurality in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).[3]

[3] In a concurring opinion, Justice Kennedy opined that the constitutionality of adult use restrictions also depends on their mitigating the adverse secondary effects attributed to adult speech, without diminishing the availability of that speech in the subject jurisdiction. *Alameda Books*, 535 U.S. at 449-50 (Kennedy, J., concurring in the judgment). Five circuits have recognized that the concurrence of Justice Kennedy, read together with the plurality opinion, constitutes the holding of the Court, under the rule articulated in *Marks v. United States*, 430 U.S. 188, 193 (1977). *See: N.W. Enterprises v. City of Houston*, 532 F.3d 162, 182 and n.18 (5th Cir. 2003); *Joelner v. Village of Washington Park*, 378 F.3d 613, 624 and n.7 (7th Cir. 2004); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856, 862 and n.1 (8th Cir. 2003); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1310 and n.19 (11th Cir. 2003). The requirements of the plurality thus constitute the absolute

(Continued on following page)

Neither opinion invalidated the ordinance on First Amendment grounds. Rather, for different reasons, and at different points in their structured *Alameda Books* analysis, both the panel majority and Judge Ebel correctly found that material questions of fact existed on the record, which precluded the entry of summary judgment for the Petitioners on the First Amendment merits of the case.

I. The Panel Majority Correctly Held That Whether the Adult Use Restrictions Adopted In the Second Ordinance Were Reasonably Adopted, In Light of the Legislative Record Advanced Below, Presented a Material Fact Question, Precluding Summary Judgment.

The panel majority carefully examined the legislative record advanced in support of the second ordinance, and concluded that record could not be held to provide a reasonable basis for the restrictions imposed by that ordinance, conclusively, and as a matter of law, thereby precluding summary judgment on that question for the Petitioners. Pet. App. at 25a.

The three-part analytical framework applicable to adult use ordinances contested on First Amendment grounds was articulated in *Alameda Books*, in the plurality opinion which, read together with the concurrence of Justice Kennedy, carefully delineates

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minimum the Petitioners must demonstrate if the second ordinance is to survive First Amendment review.

what the parties to a case such as this must prove, and when, in order to prevail.

After concluding that an adult use ordinance is, in fact, aimed at the secondary effects, and not the content of adult speech, a court must next ask "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books*, 535 U.S. at 441 (plurality).[4]

That inquiry, while marked by a certain degree of deference to legislative judgment, is to be a real inquiry nonetheless, and not merely a pro forma ratification of whatever legislative rationale may be offered in support of a given ordinance.

> Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." On the other hand, we must acknowledge that the Los Angeles City Council is in a better

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[4] The conclusion that such an ordinance is aimed at the secondary effects, and not the content, of adult expression is a threshold requirement that must be met before intermediate scrutiny, in the form of the three part test described in Sections I and II of this Brief, can be applied. Whether the Tenth Circuit properly found that summary judgment could be entered for the Petitioners on the question of a content-neutral legislative purpose is an issue addressed in Section III of this Brief.

> position than the Judiciary to gather and evaluate data on local problems.

Alameda Books, 535 U.S. at 440 (plurality) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality) and citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)).

The exercise of such independent judgment presupposes a critical inquiry on the part of a reviewing court, that tests the connection between the stated rationale for an ordinance and the restrictions contained therein, a connection that must bear up under examination.

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Alameda Books, 535 U.S. at 438-39 (plurality).

The panel majority made precisely such an inquiry below, before concluding – on the extensive record assembled in this case – that the Petitioners had not established a reasonable relationship between the legislative record they had assembled, and the ordinance they had adopted, conclusively, and as a matter of law, so as to require summary judgment in their favor. Pet. App. at 23a.

Petitioners contend that the majority exceeded its limited mandate, substituting its own judgment for that of the county commissioners who adopted the second ordinance. Pet. at 7-8.

The contention is insupportable on the record below.

The panel majority acknowledged that its role was limited, and that it could not reweigh, de novo, the facts upon which the Petitioners relied in adopting their ordinance. Pet. App. at 16a. It also expressly recognized that the Petitioners could look to the experience of other jurisdictions in considering the ordinance at issue. Pet. App. at 17a-18a.

But what the panel majority found that the Petitioners could **not** do was simply invoke secondary effects cases and studies that not only failed to support the restrictions contained in the second ordinance, but actually militated against them.

The panel majority noted that last minute changes to drafts of that ordinance were plainly intended to force the closure of the only adult book

store in the county, notwithstanding the fact that the store was located near an interstate highway exit, and far from any residential neighborhood, church, school or other sensitive use. Pet. App. at 19a-20a.[5]

The Petitioners did so **not** on the strength of a legislative record that supported such a regulation, but **despite** evidence in their own legislative record showing that such a location is precisely the sort of place in which an adult business should be required to locate to mitigate the claimed adverse secondary effects of adult speech. Pet. App. at 18a-20a and Notes 7-9.

In short, the panel majority took seriously its obligation to "examine evidence concerning regulated speech and secondary effects," *Alameda Books*, 535 U.S. at 440 (plurality), by carefully reviewing the legislative record advanced by the Petitioners, and assessing the content of that record in light of the restrictions it was advanced to support.

It took equally seriously the longstanding requirement, first articulated in *City of Renton v. Playtime*

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[5] The panel majority noted that initial drafts of the second ordinance would have required adult uses to be only 750 feet from the nearest residence, while the second ordinance, as adopted, contained the odd requirement that there be at least 1,200 feet between an adult use and the nearest residence, a fact which it interpreted as plain evidence of an intent, on the part of Dickinson County, to capture the sole adult bookstore in the jurisdiction, which is located over 1,000 feet, but less than 1,200 feet from a building used as a residence. Pet. App. at 24a.

Theatres, 475 U.S. 41 (1986), that while a municipality may regulate secondary effects based upon the experience of other cities, that experience must be germane to its own circumstances:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, **so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.**

Renton, 475 U.S. at 51-52 (emphasis added).

Petitioners contend that the panel majority has inappropriately created a heightened standard for rural jurisdictions, by holding that they may not rely solely upon urban secondary effects studies when regulating adult uses. Pet. at 8-10.

However, the panel majority did not fault the Petitioners for their reliance on urban studies per se, but rather for their off-the-shelf use of (a) some urban studies that were inapposite to the circumstances faced by Dickinson County, and (b) others which counseled against the regulations ostensibly adopted by the county to address those circumstances.

To permit such reliance, the panel majority found, would be to approve, carte blanche, any justification a municipality might proffer in support of an adult use regulation.

> Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business, of any type, located in any setting.

Pet. App. at 19a-20a.

The problem was not that Petitioners relied entirely upon urban studies to justify the second ordinance, but that they did so without any attempt to connect those studies to the circumstances at issue in Dickinson County.

> Nowhere in the record or in the Board's brief is an effort made to analogize the studies it relied upon to the current or anticipated secondary effects of sexually oriented businesses in a rural county.

Pet. App. at 23a.

Petitioners contend that the panel majority has opened a split with the Fifth Circuit, which in *L.L.E.H. v. Wichita County, Texas*, 289 F.3d 358 (5th Cir. 2002) expressly permitted a rural county to adopt an adult use regulation solely upon the strength of urban secondary effects studies.

Any disagreement between the Fifth and the Tenth Circuits raised by this case is not of the sort that merits the attention of this Court. This is so for three reasons.

First, the panel majority declined to follow *Wichita County* not because it disagreed with the use of urban studies in that case, but because it objected to the Fifth Circuit permitting urban studies to be relied upon in anticipation of future growth, a rationale which it found did not serve a "current governmental interest," as required by *Barnes v. Glenn Theatres*, 501 U.S. 560 (1991). Pet. App. at 20 and Note 10.

Second, *Wichita County* was decided only three weeks after *Alameda Books*, the analysis of which it does not incorporate.

Third, the Fifth Circuit has not, since *Alameda Books* was decided, relied upon *Wichita County* in assessing an adult use ordinance at the first stage of the *Alameda Books* analysis.[6]

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[6] As noted by Circuit Judge Lucero, the Fifth Circuit in *Fantasy Ranch, Inc. v. City of Upper Arlington*, 459 F.3d 546, 559-62 (5th Cir. 2006) relied on *Wichita County* to assess the narrow tailoring of an adult use ordinance, an analysis which it opined had not been altered by *Alameda Books*, while recognizing that its analysis regarding the legislative rationale of that ordinance was governed by *Alameda Books*. Pet. App. at 55a. This hardly heralds a split in the circuits.

II. The Concurrence Correctly Found That Evidence in the Record Cast Sufficient Doubt Upon the Legislative Rationale Advanced by the Petitioners in Support of the Second Ordinance to Preclude Summary Judgment at the Second and Third Steps of the *Alameda Books* Analysis.

In a concurring opinion, which the panel majority joined as an alternative basis for its holding, Circuit Judge Ebel found that the Petitioners had met their initial burden, under *Alameda Books*, to demonstrate a reasonable connection between the second ordinance and its legislative record, but that the Respondent had succeeded in introducing enough evidence to cast doubt upon that rationale, thereby precluding summary judgment. Pet. App. at 40a-47a.

That conclusion, like the conclusion of the panel majority, was entirely correct, and consistent with *Alameda Books*.

A plaintiff may cast doubt upon the legislative rationale advanced in support of an adult use ordinance, " . . . either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings . . . " Either method shifts the burden of proof "back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 438 (plurality). The Respondent hewed carefully to this methodology below.

To demonstrate that the evidence in the legislative record did not support the ostensible rationale for the second ordinance, the Respondent introduced a substantial body of expert testimony, which carefully analyzed the studies upon which Dickinson County claimed to have relied in adopting that ordinance. Pet. App. at 44a-45a.

That evidence contained exhaustive critiques of the evidence relied upon by the county, demonstrating the ways in which that evidence was shoddy and did not support the legislative rationale of the county. Pet. App. at 45a.

To dispute the factual premises which undergird the legislative rationale of the county – that there is a connection between the operation of adult uses and the existence of adverse secondary effects – the Respondent did even more.

The Respondent demonstrated that its adult bookstore was responsible for none of the adverse secondary effects the county had ostensibly legislated in an effort to address.

Between September 2003 and July 2005, neither the first nor the second adult use ordinance was enforced. The bookstore operated by the Respondent thus operated for twenty months without being subject to any adult use regulation.

That notwithstanding, two witnesses associated with the Petitioners testified that, during that period, Dickinson County experienced none of the adverse

secondary effects which those ordinances were ostensibly adopted to ameliorate.[7]

Judge Ebel correctly concluded that this evidence **alone** was sufficient to cast doubt upon the legislative rationale of the county, precluding summary judgment. Pet. App. at 42a-43a.

Second, the Respondent introduced additional evidence, including expert testimony and five analytical studies which demonstrate the absence of a connection between adult uses and the existence of adverse secondary effects. Pet. App. at 42a.

The evidence presented by the Respondent below, which ran to many hundreds of pages, was of precisely the sort which this Court in *Alameda Books* held may be used to cast doubt upon the legislative rationale for an adult use ordinance.

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[7] As noted above, the county did not pass the first ordinance until July 2004. Neither that law, nor the second ordinance, adopted in December of that year, were enforced while this case was pending in the trial court. In the summer of 2005, Respondent deposed the Dickinson County Undersheriff, and the County Commissioner who was designated as the Civil Rule 30(b)(6) deponent for the county. Both testified that the county had experienced no increase in such adverse secondary effects as crime, sexually transmitted disease, or other public health problems, the prevention of which were ostensibly the basis for adopting the ordinance, since the adult bookstore opened, some twenty months earlier, despite the county having agreed not to enforce its adult use ordinances. Pet. App. at 42a and Note 6.

That fact notwithstanding, the district court held that the Respondent had failed to cast any doubt upon the legislative rationale of the county, because much of the evidence described above was offered in the report and declaration of Daniel Linz, a professor at the University of California.

Dr. Linz presented both the critiques of the evidence in the legislative record, and the five studies, described above, tending to negate the existence of adverse secondary effects. The district court ignored the latter evidence, and concluded, as a matter of law, that the former was immaterial, having been rejected in other cases. Pet. App. at 68a-69a.

The Petitioners now echo that approach, asserting that the materials presented by Dr. Linz are insufficient, as a matter of law, to cast doubt upon their legislative rationale, and that to hold otherwise is to credit the opinion of an expert witness above that of the county commissioners. Pet. at 16-17.

These contentions are unavailing for several reasons. Foremost among these is that the district court erred grievously in finding the testimony of Dr. Linz to be inadequate to the task for which it was presented, both because it rejected his methodology (of which more below) and because it found his position to have been adequately rebutted by Dr. Richard McCleary, one of the expert witnesses retained by the Petitioners. Pet. App. at 69a.

Judge Ebel found that this rebuttal evidence did not merit summary judgment for the Petitioners, but

rather only created an even more closely contested question of fact, to be resolved after a trial, regarding the legislative rationale advanced by the Petitioners. Pet. App. at 46a-47a.

Judge Ebel properly noted that questions regarding the comparative merit and credibility of witnesses are not to be resolved on summary judgment, but at trial. Pet. App. at 47a. That has long been the position of this Court:

> [I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.
>
> * * *
>
> [C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

In this case, the trial court was faced with competing experts, and chose to credit the testimony of one over the other as a matter of law. What is more, it

did so to the detriment of the party resisting summary judgment, and despite the fact that the expert testimony offered by the Petitioners did nothing to negate the evidence that the county had suffered no adverse secondary effects after its sole adult use opened for business. Pet. App. at 23a-24a. This was in plain derogation of the well-established rule to the contrary. The concurrence correctly identified this as erroneous. Pet. App. at 46a-47a.

Petitioners complain that if an expert can cast doubt upon a legislative rationale "with nothing more than . . . scattering of academic criticisms" juries will be permitted to second guess the wisdom of legislative judgments, and local governments will be compelled to "read and absorb scholarly materials" before legislating. Pet. at 17. This is histrionic.

The criticisms leveled against the legislative record in this case were not punctilious niceties.

Rather, they demonstrated, to the satisfaction of all three members of the Tenth Circuit panel, that there exist open questions regarding whether the materials ostensibly relied upon by the county actually support the propositions for which they were cited. Pet. App. at 45a.

The Petitioners contend that "something more" is necessary to cast direct doubt upon their legislative record. Significantly, they never say what more. And for good reason.

A point-by-point critique of the materials in the legislative record is a direct and obvious way of "demonstrating that the municipality's evidence does not support its rationale" *Alameda Books*, 535 U.S. at 438 (plurality). Indeed, it undertakes to do precisely what the plurality in *Alameda Books* requires a plaintiff to do at this stage in a case contesting an adult use ordinance.

In that light, the suggestion, repeated by the Petitioners at every stage of the case, that this Court, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2002), dismissed the work of Dr. Linz as unreliable is of little moment.

It is a canard that should none-the-less be put to rest, and for that purpose, we address it briefly here.

It was Justice Souter who, concurring in *City of Erie*, pointed favorably to a study which Dr. Linz had submitted in that case in support of a brief filed by amicus curiae. He relied upon the study in passing, to support his observation that the ostensible link between adult uses and secondary effects is, by nature, subject to empirical verification, and that despite this, is seldom supported by anything like empirical evidence. *City of Erie*, 529 U.S. at 315 and n.3 (Souter, J., concurring in part and dissenting in part).

Writing for the plurality, Justice O'Connor responded to his observation, and "rejected the idea" that "we should ignore [a local government's own]

actual experience and require an empirical analysis" simply because such an analysis was possible. *Id.* at 302 (plurality).

But the unwillingness of this Court to accept a study, which was submitted for the first time in an amicus brief filed here, over the first hand experience of legislators whose experience was an uncontested part of the trial court record, hardly amounts to the outright rejection of Dr. Linz, his methods, or his conclusions that the Petitioners suggest.

That is all the more true here, where the studies and analysis submitted by Dr, Linz confirmed, and did not conflict with, local evidence demonstrating a lack of secondary effects in connection with our bookstore.

III. The Judgment Below, Reversing Summary Judgment for the Petitioners, Was Correct on the Alternative Ground, Rejected by Both the District Court and the Court of Appeals, that There Was Sufficient Evidence In the Record to Create a Question of Material Fact Regarding the Predominant Legislative Purpose for Which the Ordinance at Bar was Adopted.

Respondent urged, in the Court of Appeals, that summary judgment should be reversed on the additional ground that the record presented genuine questions of material fact as to whether or not the adoption of the second ordinance was predominantly

motivated by a concern with the supposed adverse secondary effects of adult speech, or was motivated by an animus toward its content, making summary judgment for the Petitioners improper on that question.

The panel majority, Pet. App. at 15a, and the concurrence, Pet. App. at 30a, rejected that position, finding that the second ordinance was content-neutral, as a matter of law, and proceeded to review that ordinance under intermediate scrutiny.

This Court has long allowed a respondent opposing certiorari to champion, as an alternative basis for the holding in the court of appeals, any basis for the judgment of that court which is supported by the record, and would not expand the relief granted to the respondent in the mandate. *Thigpen v. Roberts*, 468 U.S. 27 (1984), *United States v. New York Tel. Co.*, 434 U.S. 159, 166 (1977), *Langnes v. Green*, 282 U.S. 531, 536-37 (1931).

The Tenth Circuit correctly held that it was improper to grant summary judgment for the Petitioners in the district court. The fact that evidence in the record created a question of material fact regarding the predominant legislative purpose behind the ordinance at bar provides an additional basis for that holding.

While it is not a basis that the Tenth Circuit adopted, it is one that would support the judgment of that court.

The Tenth Circuit acknowledged the substantial evidence which demonstrated that the second ordinance was not actually adopted to address adverse secondary effects.

That evidence included the fact that the first and second ordinance were adopted notwithstanding the fact that the county experienced no adverse secondary effects after the adult bookstore at issue in this case opened. Pet. App. at 42a.

It included the fact that the second ordinance was adopted in a form plainly intended to force that store to close, as a result of amendments made after the Petitioners learned that earlier drafts would not achieve that result. Pet. App. at 24a.

And it included the fact that the store is located off an interstate highway, near an exit ramp, the sort of place where commercial businesses are usually found. It is nowhere near a church, a school, a day-care center or a park, and is more than 1,000 feet from the nearest residence. It is located precisely where most ordinances of this kind permit adult bookstores. Pet. App. at 18a.

Alameda Books "requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech].'" *Alameda Books*, 535 U.S. at 440-41 (plurality) (quoting *City of Renton*, 475 U.S. at 47-54 (emphasis deleted by the *Alameda Books* plurality).

The Ninth Circuit – in a case sustaining an adult use ordinance against a First Amendment challenge – provided a sound approach to this inquiry. A court charged with ascertaining the predominant legislative concern behind an adult use ordinance should avail itself of all the evidence in the record. We repeat its guidance here:

> We look to the full record to determine whether the purpose of the statute is to curb secondary effects. In doing so, we will "rely on all objective indicators of intent, including the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings."

Dream Palace v. County of Maricopa, 384 F.3d 990, 1013-14 (9th Cir. 2003) (quoting *Alameda Books*, 535 U.S. at 434 (plurality), and citing *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1165 (9th Cir. 2003); *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir. 1998) (citations within citations omitted)).

The record in this case contained evidence sufficient to permit a trier of fact to conclude that the second ordinance was not adopted for a predominantly content-neutral purpose.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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